CORRECTED COPY

IN THE SUPREME COURT OF THE UNITED STATES

NO. 83-1782 (2) Term 1983

THOMAS R. ALLEN, JR.,

Petitioner

v.

THE PENSION BENEFIT GUARANTY CORPORATION, et al.

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED

I. MUST A TRUSTEE TAKE CORRECTIVE ACTION AFTER ERISA'S EFFECTIVE DATE FOR TRUST INVESTMENTS OCCURRING BEFORE THAT DATE

II. DOES THE CONTINUING DUTY TO REVIEW INVESTMENTS IMPOSED UNDER ERISA REQUIRE THAT TRUSTEES OF PENSION PLANS ATTEMPT TO COLLECT DEBTS OF THE PLANS WHICH THE TRUSTEES KNOW ARE UNCOLLECTABLE

III. WHETHER TRUSTEE THOMAS R. ALLEN MAY BE HELD LIABLE FOR NON-WILLFUL OR UNINTENTIONAL VIOLATIONS OF ERISA.

PARTIES

The Respondents include:

The Pension Benefit Guaranty Corporation, as Trustee of the Bollinger Corporation Salaried Employees Pension Plan and the Bollinger Corporation Union Employees Pension Plan and as Trustee of the Portersville Equipment Company Union Employees Pension Plan and the Portersville Equipment Company Salaried Employees Pension Plan.

Co-Defendants of the Petitioner in the District Court were Morton J. Greene and Economy Industrial Properties Company.

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Opinions Below

The United States District Court for the Western District of Pennsylvania entered judgment against the Petitioner in the amounts of $352,517.28 (including prejudgment interest in the amount of $106,516.01) and $4,275.57 (including prejudgment interest in the amount of $1,221.59) on March 16, 1983. The Petitioner was held jointly and severally liable for those amounts with Morton J. Greene. A memorandum opinion explaining the court's decision was also issued by the District Court on that date. A copy of the memorandum opinion is attached at Appendix "A". The United States Court of Appeals for the Third Circuit affirmed the decision of the District Court by Order dated January 10, 1984 (Appendix "C"). To the best of Petitioner's knowledge, neither the opinion of the District Court

nor the decision of the Court of Appeals is officially reported.

Statement of Jurisdiction

The Judgment Order of the United States Court of Appeals for the Third Circuit was dated and entered on January 10, 1984. This Petition for Writ of Certiorari is timely filed within the ninety (90) day period proscribed by the Supreme Court Rules.

Jurisdiction of this court is invoked under 28 U.S.C. §1254(1).

Statutes Involved

This case involves the interpretation of The Employee Retirement Income Security Act of 1974 (ERISA) 29 U.S.C. §1001 et seq. The pertinent

portions of the Act are set out in Appendix "D".

Statement of the Case

On May 22, 1980 the Pension Benefit Guarantee Corporation (PBGC) a wholly owned Corporation of the United States, filed suit against Petitioner Thomas R. Allen (Petitioner), Morton J. Greene (Greene) and Economy Industrial Properties (Economy). That suit alleged that Petitioner, Greene and Economy had violated provisions of ERISA, and had breached their fiduciary duty under Pennsylvania law to four pension plans. Petitioner and Greene had served as trustees of four pension plans in the late 1960's and early 1970's. Those four plans; the Bollinger Corporation Salaried Employees Pension Plan (Bollinger Salaried Plan), the Bollinger Corporation Union Employee Pension Plan (Bollinger Union

Plan), the Portersville Equipment Company Union Pension Plan (Portersville Union Plan) and the Portersville Equipment Company Salaried Employees Pension Plan (Portersville Salaried Plan) provided pension benefits to the employees of the Bollinger Corporation (Bollinger) and the Portersville Equipment Company (Portersville). Petitioner and Greene were officers, directors and shareholders of those corporations. Both were officers and directors of Kincaid Industries, Inc. (Kincaid), Superior Wall Products Company (Superior) and co-partners of Economy. Superior was a wholly owned subsidiary of Kincaid and Portersville was a wholly owned subsidiary of Bollinger. From 1965 to 1975, Kincaid owned at least 80% of the outstanding stock of Bollinger. In 1975, the Bollinger stock so held was distributed by Kincaid to Greene's wife and other family members in satisfaction of debts Kincaid owed them. As of

January 1, 1975 Kincaid was and continued to be insolvent. Superior discontinued operations in February, 1976 and was also insolvent at that time. Portersville and Bollinger were liquidated through bankruptcy beginning in 1976.

In 1970, the building which housed Superior's operations was destroyed by fire. Unable to obtain financing at acceptable terms from banks, Superior was loaned $39,200 by Petitioner and Greene as Trustees on behalf of the pension plans. These loans were secured by a security interest in all of Superior's machinery, equipment, inventory and present and future accounts and contract rights. In 1972, additional money was loaned by the plans to Superior. These sums were also secured by the original collateral. In 1975, Superior paid the principal due on its debt to the Bollinger Union Plan. Its debt to the other plans as of 1976 equaled

$78,175.00 including principal and accrued interest.

In 1972, 1973 and 1974, the Portersville Union Plan made six unsecured loans to Kincaid. As of October 1, 1975 these loans including accrued interest, totaled $36,083.00. Kincaid has not repaid any principal or interest on these loans.

In 1973 the Portersville Salaried Plan made two loans to Bollinger totalling $3,750.00 and took back unsecured notes. Bollinger made one payment of $550.00 toward these loans.

In 1971 the Bollinger Salaried Plan made a loan of $11,000 to Bollinger and took back an unsecured note. Another loan was made by that Plan in November 1973 for $8,700.00 and an unsecured note was given by Bollinger in return.

After 1973, Bollinger could not afford to make contributions to the Bollinger Salaried Plan. Instead the Company issued two checks totaling $7,330.50 to the Bollinger Salaried Plan. Simultaneously the Plan issued a check for $7,000.00 to Bollinger and received an unsecured demand note for that amount. Similarly in August 1974, Bollinger issued a check to the Plan in the amount of $8,531.50, and the Plan simultaneously issued a check to Bollinger in the amount of $8,500.00. Again the Plan took back an unsecured note for that amount.

Bollinger made some payments towards the notes held by the Bollinger Salaried Plan. The last payment was made in the spring of 1976. As of July, 1976 the unpaid balance of these loans was $27,850.00 in principal and $8,304.47 in interest.

After 1973 Bollinger could not afford to make contributions to the Bollinger Union Plan. Consequently in January 1973, Bollinger issued a check for $9,127.00 to the Bollinger Union Plan and the Plan simultaneously issued a check to Bollinger for $9,000.00 and took back an unsecured note for that amount. In February 1974 Bollinger issued a check to the Bollinger Union Plan for $8,682.00 and the Plan simultaneously issued a check for $8,600.00 and took back an unsecured note for $8,600.00. Again in November 1973, the Bollinger Union Plan made a loan to Bollinger of $5,850.00 and took back an unsecured note. Bollinger made some payments toward these loans as well. As of July 15, 1976 the outstanding balance of the loans was $13,100.00 in principal and $4,513.75 in interest.

The District Court held that Petitioner and Greene breached their

fiduciary duty as trustees of the pension plans under Pennsylvania law. The court also held that Petitioner's and Greene's failure to collect the various notes after January 1, 1975 violated ERISA's fiduciary duty standards under 29 U.S.C. §1104(a)(1)(B) & (C). According to the District Court, Petitioner and Greene were therefore jointly and severally liable for the amounts of the loans outstanding, plus interest.

The District Court computed the total outstanding balances of all loans to be $170,780.36. The District Court held Petitioner and Greene liable for that amount.

In addition to numerous loans that were used to finance the operations of the companies, some funds which were deducted from employee salaries to be paid to the Plans were not paid over to the

Plans. The companies were also unable to pay their contributions to the Plans. Beginning in 1973, Bollinger deducted contributions from employees checks but did not forward all those amounts to the trusts. After February 1974, Bollinger made no contributions to the Bollinger Union Plan. Portersville made no contributions to the Portersville Union Plan for the years 1973, 1975 and 1976. No contributions were made to the Portersville Salaried Plan for the years 1972, 1975 and 1976.

As with the loans, the District Court held that Petitioner's and Greene's failure to collect the employee and employer contributions from Bollinger constituted a breach of their fiduciary duty under Pennsylvania law. Furthermore, the Court held that the failure after 1975 to collect the unpaid contributions prior to 1975 constituted a violation of

ERISA. The failure to make contributions after 1975 also constituted violations of ERISA.

The District Court found the amount of the unpaid contributions to be $72,167.47. Petitioner and Greene were held jointly and severally liable for that amount by the District Court.

The third area of liability arose from a lease of a building from Economy to Superior. The building was sold in 1975 by Superior to Economy and immediately leased back. In February 1976, Superior defaulted on its loans to the Plans and the Plans seized Superior's assets pursuant to their security agreement. Simultaneously Superior defaulted on its lease to Economy. Since the assets of Superior were located in Economy's building, Economy entered into an agreement with the Plans whereby the Plans

would assume and pay Superior's lease in exchange for storing the assets which the Plans had seized. Petitioner and Greene were each partners in Economy.

The court found that the lease arrangement violated 29 U.S.C. §1106(a) which prohibits a fiduciary from causing a plan to lease property from a party-in-interest. The District Court found that Petitioner and Greene were liable in the amount of $3,053.98 for the rent paid by the Plans to Economy.

In summary, the District Court found liability against Petitioner and Greene for the outstanding loans, outstanding contributions to the Plans and the lease to Economy in the amount of $246,001.81. The District Court also awarded the Respondent PBGC $106,516.01 in prejudgment interest. Petitioner's and Greene's total joint and several liability

therefore was $352,517.82. The District Court also awarded $4,275.57 (including prejudgment interest of $1,221.59) against Petitioner, Greene and Economy, jointly and severally, for the payments made by the Plans to Economy on account of the lease of Economy's building. The Court of Appeals affirmed the District Court's findings without opinion on January 10, 1984.

ARGUMENT

This Petition for Writ of Certiorari presents several substantial questions of Federal Law involving the application of ERISA. Provisions of the Act now govern every aspect of the formation, operation and termination of employee pension benefit plans. The issues presented by this action focus on two general areas of regulation under the Act, namely, to what extent the Act may be used to rectify violations occurring before enactment of ERISA and the extent of the damages for which trustees may be held personally liable for those violations.

ARGUMENT I

THE DISTRICT COURT'S HOLDING THAT LIABILITY UNDER ERISA ATTACHES TO A TRUSTEE OF A PENSION BENEFIT PLAN WHO FAILS TO TAKE CORRECTIVE ACTION AFTER JANUARY 1, 1975 FOR TRANSACTIONS OCCURRING BEFORE THAT DATE VIOLATES 29 U.S.C. §1144.

The first issue meriting this court's attention is the District Court's decision that pre-ERISA acts of the Petitioner give rise to liability under ERISA. (App. "A" at 54). The Court found that there was a continuing duty under ERISA "to review and liquidate improvident assets." (App. "A" at 57). The District Court's holding, however, directly contradicts 29 U.S.C. §1144 which states, "This section shall not apply with respect to any cause of action which arose or any act or omission which occurred before January 1, 1975."

It is clear from both case law and its legislative history that ERISA would not apply to events occurring before its effective date. The Courts had been unanimous in holding that ERISA is inapplicable not only with respect to causes of action prior to its effective date, but also with respect to any acts or omissions which occurred before that date. See Reuther v. Trustees of the Trucking Employees of Passaic and Bergen County Welfare Fund, 575 F.2d 1074 (3d Cir., 1978), Martin V. Bankers Trust Co. 565 F.2d 1276 (4th Cir. 1977) and Quinn v. Country Club Soda Co., 639 F.2d 838 (1st Cir., 1981).

In Reuther, supra, the Court of Appeals for the Third Circuit in deciding whether the provisions of ERISA prohibiting refunds of employer contributions could be applied

retroactively to pre-ERISA contributions stated that:

> We find even more formidable support for appellants' case when we examine the entire statutory schema for an understanding of Congress' intention as to acts, omissions or circumstances which arose prior to ERISA's effective date. ERISA's supersedure provision declares that the Act "Shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan...," 29 U.S.C. §1144(a), but it immediately qualifies this proposition with a provision that we believe is most persuasive, if not absolutely controlling, in our quest for congressional intention: "This section shall not apply with respect to any cause of action which arose, or any act or omission which occurred, before January 1, 1975," 29 U.S.C. §1144(b)(1). This language compels the inference that acts or omissions that occurred prior to the effective date of ERISA are not controlled by the provisions of the Act.
>
> Any doubt as to this reading has been totally dissipated by a recent pronouncement of the Supreme Court in a case involving pre-ERISA activities in a pension plan similar to the

one before us: "Because ERISA did not become effective until January 1, 1975, and expressly disclaims any effect with regard to events before that date, it does not apply to the facts of this case." E. I. Malone v. White Motor Corp., U.S. ________, ________ n.1, 98 S.Ct. 1185 n.1, 55 L.Ed.2d 443 (1978). Id. at 1077-1078.

Even the District Court acknowledged that ERISA was not to have retroactive effect. The Court stated "Thus, the plaintiff's [Respondent herein] claims that arise from acts or omissions that occurred prior to the effective date of ERISA are controlled by state law and not by ERISA." (App. "A" at 12). Yet, despite this clear judicial precedent and its own acknowledgments the District Court applied ERISA retroactively! The Third Circuit apparently agreed with this decision, even though directly contrary to its Reuther, supra, holding.

The District Court reasoned that "[M]any pre-ERISA investment decisions can result in ERISA liability if there is a failure to oversee improvident investments... It must be emphasized that the defendants continued to allow non-diversification of investments." (App. "A" at 57). In support of its conclusion that this faliure by the defendants warranted retroactive liability under ERISA, the District Court cited Morrisey v. Curran, 567 F.2d 546 (2d Cir., 1977) and Trustees of the Retirement Benefit Plan v. Equibank, 487 F Supp. 58 (W.D. Pa. 1980) appeal dismissed, 639 F.2d 772 (3d Cir., 1980).

In Morrisey, supra, union members sued their pension plan's trustees and union officials for violating ERISA. They charged the defendants with misappropriating the plan's funds, improvidently investing in a foreign

venture and overpaying the plan administrator. All of these events and purchases took place before ERISA became effective and the District Court dismissed the complaint on the basis that ERISA did not confer jurisdiction on claims arising prior to the enactment of ERISA. The Court of Appeals for the Second Circuit reversed on the purely jurisdictional ground regarding retained investments. "We have no doubt that under the 'prudent man' rule, which is codified in ERISA, the trustees have had a duty within a reasonable time after ERISA took effect to dispose of any part of the trust estate which would be improper to keep." Id. at 548-549. Thus, the Court's reversal was limited to the finding that ERISA applied to improperly retained assets by a Plan after ERISA's effective date. The Second Circuit left it up to the District Court to determine whether those assets were unwisely retained.

In Equibank, supra, the concern was again jurisdictional, i.e. whether the District Court could exercise pendent jurisdiction over state law claims which arose prior to ERISA. The court held pendent jurisdiction in such a situation was proper. In dicta, the Equibank court referred to the Morrisey decision and stated that, "[M]any of the pre-ERISA investment decisions could result in post enactment liability due to a "continuing duty" to oversee improvident investments." Id. at 62. The Equibank court, however, did not address the improvident investment issue itself. However, the District Court below was undoubtedly influenced by the "continuing duty" dicta language of Equibank.

The problem with the holdings of the courts below and their reliance on Morrisey and Equibank is that any investment decision made before 1975,

which later turned sour can subject the trustees to liability under ERISA if that investment was not liquidated shortly after ERISA became effective. Such a holding is obviously contradictory to ERISA's clear prohibition from retroactivity for acts or omissions prior to January 1, 1975. If the lower Court's holding is in fact the law, every bad investment decision made before 1975 is likely to have some effect in later years and will subject Trustees to liability. As such, ERISA has been made retroactive. The courts have done exactly what statutorily they could not do as stated at 29 U.S.C. 1144(b). For this reason, this Court should exercise its discretion and use its supervisory authority to review this area of Federal law.

ARGUMENT II

THE DISTRICT COURT'S HOLDING THAT A TRUSTEE'S CONTINUING DUTY TO REVIEW INVESTMENTS REQUIRES HIM TO TAKE MEANINGLESS ACTIONS NEITHER FULFILLS THE PURPOSES OF ERISA OR EQUITABLY BENEFITS THE PLAN.

The District Court in its opinion suggested that Petitioner's liability under ERISA would have been reduced if he took some action to try to collect the loans made by the plans to the various employer companies. "At the very least, the defendants could have taken steps to, in some way, secure the unsecured demand notes, or, in the alternative to obtain judgment notes." (App. "A" at 57). It was undisputed in the record below that all the company's involved had been in serious financial difficulties and were in need of a financial shot in the arm. Two of the companies declared bankruptcy in 1976. Kincaid, the holding company,

remained insolvent since there were no assets to secure its debts nor any funds to pay its debts. The main reason the loans were made by the plans was that other financing was not available. Yet, apparently ignoring all this the District Court came to the untenable conclusion that the trustees should have taken some action to collect these uncollectable debts. No support exists for this conclusion either as a matter of law or public policy. The concurrance by Judge Lumbard in Morrisey, supra, on which the District Court heavily relied explicitly states:

> "Specifically I would hold that 29 U.S.C. §1105(a)(3) makes it a violation of ERISA for a trustee who has knowledge after January 1, 1975, of a breach of fiduciary responsibility committed in the past by a co-trustee, to take no corrective action if there is a reasonable basis for the recovery of wasted assets from the receiver thereof, or of misused funds

> from the person who profited from the misuse." _Id_. at 549-550.

As a condition to liability for failure to collect past debts, Judge Lumbard required a reasonable basis of recovery. Legally and practically, such a requirement is necessary.

Common law imposes no duty on trustees to file suits where no recovery may be obtained. No duty exists in such a situation because filing suit would simply be a waste of time and money. This argument is even stronger when considered in light of the purposes behind ERISA. Congress passed the act to insure that pension plan would be properly funded so that employees would receive the pension benefits they had bargained and saved for. _See_ 29 U.S.C. §1001. The District Court, however, suggests that trustees of pension plans should spend money, by

filing suit, retaining counsel and presumably executing on judgments in situations where the trustees have little likelihood of collecting anything. This duty imposed by the District Court not only will add to the crowding of court dockets, yet more importantly, will needlessly reduce the assets of pension plans. Congress intended in passing ERISA that greater care be taken with pension plan assets so that plans would be funded when the time to pay benefits arose. The District Court would subvert this intention by requiring that trustees use the plans assets to collect worthless debts. No principal of law or equity supports the District Court's findings. Pension plans would not benefit from such actions, and in fact would be in a worse financial position than if the trustees did nothing. Clearly, the District Court's analysis is so contrary to the purpose of the act and the general

administration of pension plans, that this Court should take this matter under consideration.

ARGUMENT III

THE DISTRICT COURT'S EXPANSIVE READING OF THE LIABILITY PROVISIONS OF ERISA--ATTACHING LIABILITY TO PETITIONER ALLEN FOR NON-WILLFUL VIOLATIONS--IS UNSUPPORTED BY THE LANGUAGE OR THE LEGISLATIVE HISTORY OF THE ACT.

The District Court held that Petitioner's purported resignation on December 31, 1974 was ineffective and therefore Petitioner was liable for the breaches of his co-fiduciary Greene after that date. While it is correct that 29 U.S.C. §1105 assigns liability to a fiduciary for breaches by his cofiduciary which takes place with his knowledge or with his aid, that situation is not present here. Petitioner thought he had effectively resigned. His involvement as a trustee of the plans ceased after that resignation.

His resignation, whether or not effective, does not relieve him of liability for any past breaches of his fiduciary duty. However, his resignation, whether or not effective, should make him not liable for all later breaches by a co-fiduciary. Once Petitioner resigned, he took no part in plan functions. As such, any inaction on his part to correct breaches must not be willful, since he thought himself to be powerless. The legislative history shows that it was the intention of Congress to hold fiduciaries liable for the losses of assets they caused. See S. Rep. 127, 93 Cong. 2d Sess., reprinted in 1974 U.S. CODE CONG & AD NEWS, 4838, 4865-4867. It is equally clear that Congress intended that co-fiduciaries should be encouraged to police one another's actions, so that the assets of pension trusts would be protected. Nothing in the legislative history suggests, however, that a fiduciary shall

be unlimitedly liable for the actions of his co-fiduciary after he is no longer involved with the operation of the trust. Even though Petitioner's resignation was ineffectual, in the legal sense, his involvement with the trusts completely stopped. Since he thought he had resigned, any violations of his fiduciary duty after his resignation could not have been willful. These unwillful violations of his fiduciary duty should not give rise to the extensive liability imposed on Petitioner by the District Court.

Since the fiduciary responsibility sections of ERISA are among the most important features of the Act, clarification of the liability of trustees under these sections is essential to the operation of pension plans. This Court's guidance is thus needed in this area.

CONCLUSION

Pension Plans play an increasingly important role in the welfare of millions of employees. The issues presented by this Petition are of the utmost national importance. Therefore, on the basis of the above-stated Arguments the Petitioner respectfully requests that this Court grant a Writ of Certiorari.

Respectfully submitted,

Frederick A. Polner
Steven L. Sablowsky
Attorneys for Petitioner

CERTIFICATE OF SERVICE

I, Frederick A. Polner, a member of the Bar of this Court, hereby certify that a true and correct copy of the foregoing Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit were mailed this day to the following:

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APPENDIX A

Memorandum Opinion of U. S. District Judge Alan N. Bloch dated March 16, 1983

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

THE PENSION BENEFIT GUARANTY CORPORATION, as Trustee of the Bollinger Corporation Salaried Employees Pension Plan and the Bollinger Corporation Union Employees Pension Plan and as Trustee of Portersville Equipment Company Union Employees Pension Plan and the Portersville Equipment Company Salaried Employees Pension Plan,	)	
Plaintiff,	)	
vs.	)	Civil Action No. 80-688
MORTON J. GREENE and THOMAS R. ALLEN, JR., as individuals and as former trustees of the Bollinger Corporation Salaried Employees Pension Plan, the Bollinger Corporation Union Employees Pension Plan, the Portersville Equipment Company Union Employees Pension Plan, and the Portersville Equipment Company Salaried Employees Pension Plan, and ECONOMY INDUSTRIAL PROPERTIES,	)	
Defendants.	)	

MEMORANDUM OPINION

BLOCH, District J.

Plaintiff, the Pension Benefit Guaranty Corporation (hereinafter referred to as "PBGC"), is the government body created by the Employee Retirement Income Security Act of 1974 (hereinafter referred to as "ERISA") to administer the Mandatory Pension Plan Termination Program.[1] Defendants Morton Greene (hereinafter referred to as "Greene") and Thomas R. Allen, Jr. (hereinafter referred to as "Allen") are residents of Pennsylvania. At all times relevant to this action, Greene and Allen were trustees under four pension plans and general partners in defendant Economy Industrial Properties (hereinafter referred to as "Economy"). This Court has jurisdiction under ERISA, 29 U.S.C. §1132.

The plaintiff's principal task under ERISA is to guarantee the payment of pension benefits to participants of terminated pension plans. The two individual defendants, Greene and Allen, were officers in five related Pennsylvania corporations and trustees of the trusts established to fund the four pension plans of those corporations. The pension plans were all terminated in 1976, and plaintiff was subsequently appointed as statutory trustee of the plans. Plaintiff brings this action to recoup certain monies from the defendants as follows: principal and interests on loans which the pension plans allegedly made to the corporations while the individual defendants were trustees; uncollected employee contributions; rental payments paid by two of the plans to Economy pursuant to, what plaintiff contends was, an illegal lease agreement; and certain interest payments from a plan investment which were sent to defendant

Greene and which defendant Greene allegedly converted to his own use.

The defendants all deny any liability to plaintiff and assert two counterclaims of their own. First, defendant Economy alleges that the lease agreement between the plans and Economy was valid and demands the balance of the rental payments owed. Second, the defendants Greene and Allen claim that, in 1976, they requested that plaintiff provide them with a statement of their vested benefits pursuant to 29 U.S.C. §1025(a).[2] Defendants Greene and Allen further claim that plaintiff has failed and refused to provide the requested information and that this makes plaintiff liable to defendants Greene and Allen for $100 per day from the date of such refusal or failure pursuant to 29 U.S.C. §1132(c).[3]

At the pretrial conference, the parties indicated to the Court that the matter could be decided on motions for summary judgment. The Court agreed, and the parties have filed cross motions for summary judgment.

The parties have stipulated to the facts of this case, and that stipulation is attached to this Opinion as an exhibit. However, in order to enhance the comprehendibility of this Opinion, the Court summarizes the major facts at this point. The plaintiff is a wholly-owned United States government corporation created by ERISA, 29 U.S.C. §1302, to administer the mandatory pension plan to termination insurance program created by Title IV of ERISA.

This action involves the following four Pennsylvania corporations: (1) Kincaid Industries,

Inc. (hereinafter referred to as "Kincaid"); (2) Bollinger Corporation (hereinafter referred to as "Bollinger"); (3) Portersville Equipment Company (hereinafter referred to as "Portersville"); and (4) Superior Wall Products Company (hereinafter referred to as "Superior"). Moreover, it also involves four pension plans, namely: (1) the Bollinger Corporation Union Employees Pension Plan (hereinafter referred to as the "Bollinger Union Plan"); (2) the Bollinger Corporation Salaried Employees Pension Plan (hereinafter referred to as the "Bollinger Salaried Plan"); (3) the Portersville Equipment Company Union Employees Pension Plan (hereinafter referred to as the "Portersville Union Plan"); and (4) the Portersville Equipment Salaried Employees Pension Plan (hereinafter referred to as the "Portersville Salaried Plan.").

At all times relevant to this action, Green was a director, officer, or shareholder of Kincaid, Bollinger, and Portersville, and a half-partner in Economy, and Allen was a director, officer, or shareholder of Kincaid, Bollinger, and Portersville, and a half-partner in Economy. Superior was a wholly-owned subsidiary of Kincaid. Greene and Allen became trustees of the trusts for the two Bollinger plans in the mid-1960's, and of the trusts for the two Portersville plans in 1970. They attempted to resign their trusteeships in 1974, but, as will be discussed at a later point in this Opinion, their attempted resignations were not successful. It must also be noted that Greene, Allen, Kincaid, Bollinger, and Superior were all parties in interests with respect to the two Bollinger plans pursuant to 29 U.S.C. §1002(14), and Greene, Allen, Kincaid, Portersville, and Superior were all

parties in interests with respect to the two Portersville plans pursuant to the same section.

All four corporations suffered financial difficulties in the early to middle 1970's, and Bollinger filed for bankruptcy in March of 1976. Portersville also filed for bankruptcy in April of 1976.

The Bollinger Union Plan terminated in December, 1976, and the Bollinger Salaried Plan terminated in February, 1977. Likewise, the Portersville Union and Salaried Plans terminated in July 1976. The plaintiff subsequently became statutory trustee of all plans.

In addition to the stipulation of facts, the parties have filed affidavits, depositions, and a 644-page appendix that

contains 62 joint exhibits, which the Court refers to in this Opinion. The Court, after carefully considering the motions, the stipulated facts and submitted materials, and the briefs of the parties, hereby grants the plaintiff's motion for summary judgment and denies defendant's motion.

The plaintiff's claim contains both pre-ERISA and ERISA violation. Accordingly, the Court deems it appropriate to discuss the pre-ERISA and ERISA violations separately below. Moreover, as stated above, the defendants assert counterclaims which will also be discussed in a separate section of this Opinion.

A. Pre-ERISA Claims

The plaintiff alleges that Greene and Allen violated their fiduciary

responsibilities as trustees of the trusts in the 1971-74 period in violation of Pennsylvania trust law.[4] In response to these claims, the defendants assert two major defenses. First, the defendants assert that the provisions of ERISA are inapplicable to most of the plaintiff's claims.[5] Second, the defendants contend that the six-year statute of limitations, under either Pennsylvania law[6] or ERISA,[7] bars any claim against them which arises from conduct that occurred prior to May 22, 1974.[8] The Court deems it appropriate to dispose of defendants' contentions before addressing the merits of plaintiff's pre-ERISA claims because resolution of these two contentions at this point will help facilitate orderly discussion and understanding of the pre-ERISA claims.

It appears that defendants' first contention--that the provisions of ERISA

are inapplicable to several of plaintiff's claims--is acceptable to plaintiff since plaintiff bases its claims for pre-1975 conduct on state law. However, the Court deems it necessary to address the issue because of the jurisdictional question which it raises.

Title 29 U.S.C. §1144(b)(1) provides that ERISA "shall not apply with respect to any cause of action which arose, or any act or omission which occurred, before January 1, 1975." In Martin v. Bankers Trust Co., 565 F.2d 1276 (4th Cir. 1977), the plaintiff brought an action in federal court alleging an ERISA violation for acts which occurred before the effective date of ERISA. The Fourth Circuit held that ERISA's substantive provisions did not apply to the claim. The Third Circuit has also held that the language of 29 U.S.C. §1144(b)(1) compels the conclusion that acts or omissions

which occurred prior to the effective date of ERISA are not controlled by that Act. Reuther v. Trustees of Trucking Employees of Passaic and Bergen County Welfare Fund, 575 F.2d 1074, 1078 (3d Cir. 1978). Thus, plaintiff's claims that arise from acts or omissions that occurred prior to the effective date of ERISA are controlled by state law, and not by ERISA. This gives rise to the question of whether state law claims can be heard in the same case as ERISA claims.

The answer to this question is found in a Second Circuit opinion and a decision of this Court relying upon that Second Circuit decision. In Morrissey v. Curran, 567 F.2d 546 (2d Cir. 1977), the defendants improperly administered a pension plan by: (1) misappropriating funds for personal use, (2) improvidently investing over $1 million in a foreign venture, and (3) paying a large sum to the

administrator of the plan. _Id_. at 547. The district court dismissed the suit finding that all acts complained of occurred pre-ERISA. The Second Circuit reversed, reasoning that ERISA imposed a continuing duty to review and liquidate improvident investments. Thus, as to at least one of the claims, the defendants' fiduciary duty continued after ERISA. The Court held that that particular claim was within the "exclusive jurisdiction of that Act." _Id_. at 549. Moreover, the Second Circuit, relying upon the United States Supreme Court case of _Aldinger v. Howard_, 427 U.S. 1 (1976), indicated that the district court could take pendent jurisdiction over the other claims under state law. _Id_. n. 11.

This reasoning was adopted by this Court in _Trustees of the Retirement Benefit Plan v. Equibank_, 487 F.Supp. 58 (W.D. Pa.), _appeal dismissed_, 639 F.2d 772

(3d Cir. 1980). In the _Equibank_ case, the Court held that the significance of _Morrissey_ is two-fold. First, it highlights the difficulty of attempting to bifurcate pre-ERISA acts from post-ERISA acts.[9] _Id_. at 62. Second, even though pre-ERISA acts or omissions are separate state law claims, Morrissey indicates that _a court may assume pendent jurisdiction_. _Id_.

In this case, the Court believes that plaintiff has raised valid ERISA claims and violations.[10] Accordingly, the Court can assume pendent jurisdiction over plaintiff's pre-ERISA, state law claims.[11]

Next, the Court disposes of defendants' statute of limitations argument, which lacks merit. As stated, the defendants contend that the six-year statute of limitations, under both Pennsylvania law and ERISA, bars conduct

that occurred prior to May 22, 1974. The defendants raise the ERISA statute of limitations even though they acknowledge that ERISA was not in effect prior to 1975. The plaintiff asserts that the ERISA statute of limitations does not apply, and the Court agrees. This leaves the Pennsylvania statute of limitations to contend with.

Greene and Allen became trustees of the trusts for the Bollinger plans in the middle 1960's and of the Portersville plans in 1970. Stipulation of Facts ¶ 15. They served in this capacity up until the effective date of ERISA.[12] Greene and Allen were named trustees in connection with written, expressed[13] trust funds and trust agreements. See generally Joint Appendix, Joint Exhibits 1-4 (pp. 1-73) and Joint Exhibits 8-13 (pp. 118-171). Accordingly, Greene and Allen were "express trustees."

Under Pennsylvania law, an express trustee may not plead the statute of limitations as a defense. Sherwin v. Oil City National Bank, 229 F.2d 835, 836 n.2 (3d Cir. 1956); Pennsylvania Co. for Insurances on Lives v. Ninth Bank & Trust Co., 306 Pa. 148, 154 (1932). Thus, Greene and Allen, as express trustees, cannot plead the statute of limitations.

Alternatively, even if the statute of limitations defense were available to Greene and Allen, the statute does not begin to run until the cestui knows, or under the circumstances ought to know, of the facts that give rise to the cause of action. United States v. Rose, 346 F.2d 985 (3d Cir. 1965); Pennsylvania Co. for Insurances on Lives, supra, at 155. The plaintiff was not appointed statutory trustee of the Portersville Plans until December of 1976 and was not appointed statutory trustee of the

Bollinger Plans until May of 1977. Joint Appendix, Joint Exhibits 8-11 (pp. 117-128). Accordingly, plaintiff was not in a position to know of the facts which give rise to this action until, at the earliest, December of 1976.[14] Plaintiff filed the action in May of 1980, well within the six-year statute of limitations period. In sum, the statute of limitations defense is not available to Greene and Allen, but even if it was, plaintiff has filed this action in a timely fashion.

Having disposed of these two issues, the Court turns its attention to the plaintiff's state law claims. Plaintiff claims that defendants Greene and Allen breached their fiduciary duty under state law by making certain loans, on behalf of the plans, and by failing to collect, or take other action in connection with, the failure of Bollinger

and Portersville to make contributions to the respective pension plan trust funds. These claims will be discussed in more detail below.

1. The Loans

The Court first addresses the alleged illegal loan transactions. In late 1970, the first loan transaction took place. In that transaction, Greene and Allen[15] agreed, on behalf of the plans to loan Superior $39,200.[16] Stipulation of Facts ¶ 28. In return, Superior gave the plans a promissory note, which provided for 9-1/2 interest per annum and 16 quarterly payments, and a security in all of its machinery and equipment, inventory, and accounts receivable. Joint Appendix, Joint Exhibit 28 (p. 304). The financing statement filed in this transaction indicated that the collateral for the loan was free and clear of all liens and

encumbrances. Joint Appendix, Joint Exhibit 28 (p. 307). However, as the plaintiff correctly points out, the inventory pledged as collateral was, in fact, encumbered because it had previously been pledged as collateral in another transaction. Joint Appendix, Joint Exhibit 6 (p. 91).

Between June and September, 1972, the Portersville Union Plan loaned an additional $30,800 to Superior. Joint Appendix, Joint Exhibit 28 (p. 302). No new note was signed, or additional security given, for this second loan.[17] Greene Deposition of October 26, 1981, p. 137. On September 11, 1975, Superior paid the entire principal balance of $9,925[18] due to the Bollinger Union Plan. Stipulation of Facts ¶ 28; Joint Appendix, Joint Exhibit 28 (p. 302). However, by February 17, 1976, the amount of $78,175,[19] which includes principal and

interest amounts, remained outstanding to the other three plans. Joint Appendix, Joint Exhibit 28 (p. 302). Greene testified, at a deposition, that none of the quarterly installments required by the note were paid because there were no funds available. However, Greene further testified that he was not concerned because the loans were more than adequately covered by the collateral.[20] Greene deposition of October 26, 1981, p. 65.

Additionally, the Bollinger Salaried Plan made certain loans to Bollinger. On October 11, 1971, Greene transferred $11,233.63 from the Bollinger Salaried Plan investment account to that plan's checking account. Greene and Allen then immediately wrote a check for $11,000 to Bollinger and took back an unsecured, demand note. The note, signed by Greene and Allen, called for 9 percent interest

per annum on the principal amount. Joint Appendix, Joint Exhibit 4 (pp. 439-447).

By 1973, Bollinger could not afford to make contributions to the Bollinger Salaried Plan. In January of 1973, Bollinger issued two checks, totalling $7,330.50, to the Bollinger Salaried Plan, and that plan simultaneously issued a check for $7,000 to Bollinger. Stipulation of Facts, ¶ 38. Greene called this a "wash transaction," which insured that the checks would cross at the bank and that neither would bounce. Greene further stated that this was, in essence, a loan transaction and that this loan transaction was preferable to a showing of "unpaid pension plan contributions on the books." Greene deposition of October 26, 1981, p. 106. In return for the loan, Greene and Allen signed a demand note, on behalf of Bollinger, which provided for 9

percent interest per annum. Joint Appendix, Joint Exhibit 43 (p. 459). It should be noted that this $7,000 loan took place while the original $11,000 amount was still outstanding and with no payment having been made, on either principal or interest, since the original loan of October 11, 1971. Joint Appendix, Joint Exhibit 45 (pp. 466-481).

On November 8, 1973, Greene withdrew $8,700 more from the Bollinger Salaried Plan investment account and, on the same day, transferred that amount to Bollinger. In return for the loan, Greene and Allen signed an $8,700 demand note, which provided for 9 percent interest per annum. Joint Appendix, Joint Exhibit 42 (pp. 449-451).

In August of 1974, a second "wash transaction" took place. That is, at that time, Bollinger again could not afford to

make contributions to the Bollinger Salaried Plan. Greene deposition of October 26, 1981, pp. 104-106. Therefore, Bollinger issued a check to the Bollinger Salaried Plan in the amount of $8,531.50, and the plan simultaneously issued a check back to Bollinger in the amount of $8,500 and took back an unsecured demand note, signed by Greene and Allen, for that amount. Stipulation of Facts, ¶ 38.

Bollinger was billed monthly for the interest due on the loans and that minimal payments were made.[21] However; as of the time of Bollinger's bankruptcy filing, in March of 1976, $35,288.99 remained outstanding, which figure includes the principal and balance of $27,850 and the interest balance of $7,438.99.[22] Joint Appendix, Joint Exhibit 45 (p. 519).

There were also loans made from the Bollinger Union Plan to Bollinger. Two of the loans were "wash transactions." First, in January of 1973, Bollinger made a $9,127 contribution to the plan and immediately took back a $9,000 loan. An unsecured demand note, providing for 9 percent interest, was signed by Greene and Allen in return for the loan. Joint Appendix, Joint Exhibit 47 (pp. 529-531). A second "wash transaction" occurred in February of 1974. In that transaction, Bollinger made an $8,832.80 contribution to the Bollinger Union Plan and took back a $8,600 loan. Again, Greene and Allen signed a demand note, which provided for 9 percent interest on the $8,600 amount. Joint Appendix, Joint Exhibit 48 (pp. 531-536).

Also, the Bollinger Union Plan loaned Bollinger $5,850 in November of 1973. In return, Bollinger gave an

unsecured demand note back to the plan signed by Greene and Allen. As in all other cases, the note provided for 9 percent interest. Joint Appendix, Joint Exhibit 49 (pp. 537-542).

Between February of 1973 and July of 1976, Bollinger was sent monthly bills on these loans by the Bollinger Union Plan Trust. Various payments were made, with all payments applied to principal. By the time of Bollinger's bankruptcy in March of 1976, there remained outstanding $17,220.75, which figure represents $13,100 in principal and $4,120.75.[23] Joint Appendix, Joint Exhibit 50 (p. 581).

The Portersville Salaried Plan also made loans to Bollinger. In October and November of 1973, the Portersville Salaried Plan made two loans to Bollinger, totalling $3,750.[24] Once again, Bollinger gave back two unsecured demand notes, at 9

percent interest signed by Greene and Allen, in exchange for the loans. Joint Appendix, Joint Exhibit 39 (pp. 393-403). As of March, 1976,[25] there remained $4,012.62 outstanding. Joint Appendix, Joint Exhibit 40 (p. 433).

Finally, the Portersville Union Plan made loans to Kincaid. Between June of 1972 and September of 1972, the Portersville Union Plan loaned Kincaid $26,806.97. Joint Appendix, Joint Exhibit 37 (p. 382). Another loan was made, in January, 1973, for $3,193.03, and still another occurred in October of 1974, for $2,900. Joint Appendix, Joint Exhibit 37 (pp. 386-387). These loans total $32,900.

The plaintiff's brief acknowledges that $2,100 was paid on these loans, with that entire payment going toward principal. This left a principal balance due of $30,800. The only evidence

of interest due on this amount is a bill from the Portersville Union Plan Trust to Kincaid, indicating that $5,283 interest was due. Joint Appendix, Joint Exhibit 38 (p. 391). The total principal and interest outstanding is $36,083.

The Court notes, at this point, that the total claimed outstanding on these loans is $170,780.36. It is now appropriate to review the applicable Pennsylvania law that governs these transactions.

In Pennsylvania:

> Every fiduciary is obligated, in managing the investment of trust assets, to exercise the care, skill, and judgment of an ordinarily prudent person unless it either has or procures its appointment by representing that it has greater skill, in which case it is obligated to exercise such greater skill.

Estate of Stetson, 463 Pa. 64, 74-75 n. 4, 345 A.2d 679, 685 n. 4 (1975). See In re Estate of Killey, 457 Pa. 474, 477, 326 A.2d 372, 375 (1974). This "prudent man rule" is statutory law in Pennsylvania. Title 20 Pa. C.S.A. §7302(b) provides in pertinent part as follows:

> Any investment shall be an authorized investment if purchased or retained in the exercise of that degree of judgment and care, under the circumstances then prevailing, which men of prudence, discretion and intelligence exercise in the management of their own affairs, not in regard to speculation, but in regard to the permanent distribution of their funds, considering the probable outcome to be derived therefrom as well as the probable safety of their capital.

This rule has been the law of Pennsylvania for some time (In re Gillingham's Estate, 353 Pa. 493, 46 A.2d 269 (1946); In re Greenawalt's Estate, 48 Dauph. 222, aff'd. 343 Pa. 413, 21 A.2d 890 (1940); In re

Brown's Estate, 287 Pa. 499, 135 A. 112 (1926)) and is intended to prevent transactions which offer a high potential for loss of plan assets and insider abuse. See In re Noonan's Estate, 361 Pa. 26, 30-31, 63 A.2d 80, 83 (1949). The fact that a prohibited investment or loan is or may be ultimately repaid does not render the loan lawful; its propriety must be judged at the time that the loan (investment) was made. In re Saeger's Estate, 340 Pa. 73, 75-76, 16 A.2d 19, 21 (1940).

The plaintiff, who seeks to surcharge the trustee in this case, bears the burden of proving that the trustee breached an applicable fiduciary duty. Estate of Stetson, supra, at 84, 345 A.2d at 690. Further, the plaintiff must establish that there is a causal connection between the breach of duty and the loss. Id. at 83, 345 A.2d at 690.

However, once a beneficiary[26] has succeeded in proving a breach of duty and a loss flowing therefrom, the burden shifts to the charged trustee to establish that the loss would have occurred in the absence of a breach of duty. Id. at 84, 345 A.2d at 690. The Court emphasizes that as between an innocent beneficiary and a defaulting fiduciary (trustee), the fiduciary must bear the risk of uncertainty as a consequence of his breach of duty. Id.

In this case, it is clear to the Court that defendants Greene and Allen breached their fiduciary duties as trustees. Remembering that a fiduciary is bound by the prudent man rule, the Court does not believe that a prudent man would invest all of his money in one type of investment, especially when companies in which the money was invested were having financial, and other types of, problems.

See Stipulation of Facts ¶ 8 and 28. In essence, the Court does not believe that it is prudent to put "all of the eggs in one basket" because if that basket breaks, the eggs break with it. Rather, the Court believes that the prudent thing to do is to diversify investments so that the solvency of the trust fund is not dependent upon one investment or type of investment.

The trustees' failure to diversify investments in this case proved to be especially detrimental. They continued to pour money into these companies. This was done to the point that the trust funds were almost completely dissipated. As of mid-1976, the Portersville Union Plan had only $89.49 in cash in its trust fund (Joint Appendix, Joint Exhibit 21 (p. 211a)); the Portersville Salaried Plan had only $15.77 in its trust fund (Affidavit of Michael

Madron, Exhibit 1 (docket entry 46)); and the Bollinger Salaried Plan had no cash (Joint Appendix, Joint Exhibit 25 (p. 226)). These plans did hold notes receivable for the amounts outstanding, but the notes were received from companies that could not pay them. Moreover, all but one of the notes were unsecured. The Bollinger Union Plan did hold United States Treasury notes worth $17,000, but it also held notes receivable in excess of $18,000 from companies that could not pay them. Joint Appendix, Joint Exhibit 26 (p. 231). In sum, the plaintiff's brief correctly states that the trust funds were "ravaged."

The problem is compounded in this case by the fact that the trustees, Greene and Allen, also had a vested interest in the companies to which the loans were made. As Stipulation of Fact, ¶ 3, 4, and 5 state, at all relevant times, Greene and

Allen were directors, officers, or shareholders of Kincaid, Bollinger, and Portersville (the companies to which the loans were made), and Superior (another company to which a loan was made) was a wholly-owned subsidiary of Kincaid. Under Pennsylvania law, these loans amount to self-dealing by a fiduciary, which is forbidden. As the Pennsylvania Supreme Court has stated:

> A fiduciary entrusted with the interests of others cannot be allowed to make the business an object of interest to himself because from the frailty of nature, one who has the power, will be too readily seized with the inclination to use the opportunity for serving his own interest at the expense of others for whom he is entrusted.

In re Noonan's Estate, supra, at 31, 63 A.2d at 83. The test for forbidden self-dealing is "whether the fiduciary had a personal interest in the subject transaction of such a substantial nature

that it might have affected his judgment in a material connection," and "the extent of a fiduciary's disqualifying interest for self-dealing is not 'did his interest affect his judgment,' but rather 'might his interest affect his judgment.'" Id. These tests are clearly met in this case in that the trustees had a substantial personal interest in the companies to which the loans were made that might have affected their judgment. The position of the trustees put them in the best position to recognize the violatile financial condition of the companies to which they were making loans; nevertheless, they made loans in spite of this knowledge. It is apparent to the Court that the trustees were concerned with their own financial interests first, and the financial condition of the plans was of secondary concern. In other words, the trustees served their own interest at the expense of others for whom they were entrusted.

Thus, the trustees not only violated the prudent man rule, but also the forbidden self-dealing rule.

It may be argued that Greene was the primary violator here because he, alone, consistently signed the withdrawal and deposit slips. See e.g., Joint Appendix, Joint Exhibits 41, 42, 43 (pp. 442, 449, and 456). However, when a co-trustee "hears of any fact tending to call his attention to the mismanagement or misapplication of trust funds by his co-trustee it is his duty to intervene... failure to do so would be a breach of trust imposing liability upon him for the loss." Adams Estate, 221 Pa. 77, 81 (1908). See also Herr v. United States Casualty Co., 347 Pa. 148, 150, 31 A.2d 533, 534 (1943). In light of the fact that Allen signed a check for a large amount from a plan to Bollinger (see Joint Appendix, Joint Exhibit 41 (p. 439)) and

signed all unsecured demand notes for the loans, he should have at least been on notice of the improper investments, and his failure to intervene puts him on the same plateau with Greene.

The defendants do not deny these loans; rather, they argue that the loans were prudent under the circumstances. As their brief states:

> Although subsequent events have proven that these investments were not profitable, the trustees had no reason to suspect this at the time of the loans. The corporations were run by the Defendants and the Defendants believed the corporations would eventually be successful. They went so far as to invest their own personal funds in the corporations. In light of subsequent events, it is easy for Plaintiff to argue with hind-sight that the loans were unwise investments, but at the time they were made, these transactions were intended to benefit the Plans because absent such transactions the Plans may well have failed prior to the inception of the Pension Benefit Guaranty Corporation...and the

> employees would have been denied of any insurance on their own funds whatsoever.

Defendants' Brief in Response to Motion for Summary Judgment, p. 7 (emphasis added).

This argument holds no weight with the Court. Whether one looks at the transactions in foresight or hindsight, they are illegal because they violate the prudent man and forbidden self-dealing rules. Moreover, the Court does not believe that these transactions were intended to protect the plans; rather, they were intended to advance the trustees' own personal interest.

In sum, in connection with the loan transactions, the Court is satisfied that there was a breach of fiduciary duty by both Greene and Allen. This breach was the direct cause of loss on the part of

the plans, and the defendants have not established that the loss would have occurred in the absence of the breach of duty. Accordingly, the trustees may be surcharged for these loans.

2. The Contributions

The plans also had a large amount of outstanding contributions at the time that the PBGC took over as statutory trustee. It should be noted at this point that the Court is cognizant of the fact that certain of these contributions came due after the effective date of ERISA; thus, this discussion may also include post-ERISA failures to make such contributions. Nevertheless, the Court believes that Greene and Allen have breached their fiduciary obligations in connection with these contributions both under state law and under ERISA. Therefore, a distinction between the two

is merely a matter of academics. The Court will, however, discuss the contributions in the ERISA section of this Opinion to clarify its position on this issue.

Initially, the Court addresses the contributions due the Bollinger Salaried Plan. The Bollinger Salaried Plan required participants/employees to contribute 4 percent of their monthly compensation to the plan. Joint Appendix, Joint Exhibit 2 (p. 26). Between 1953 and 1976, Bollinger deducted the appropriate amount from the employees' pay checks, but, beginning in 1973, Bollinger did not forward all of these amounts to the trust fund. Stipulation of Facts, ¶ 46. As of the time of Bollinger's bankruptcy in March of 1976, Bollinger owed employee contributions of $14,269.18.[27] Joint Appendix, Joint Exhibit 45 (p. 519).

The Bollinger Salaried Plan also required the employer (Bollinger) to make contributions to the trust fund. Joint Appendix, Joint Exhibit 2 (p. 26). After August, 1974, Bollinger made no contributions, or issued notes in lieu of contributions, to the trust fund. Stipulation of Facts, ¶ 40. As of March, 1976, Bollinger owed $14,391.45[28] as its share of the contributions. Joint Appendix, Joint Exhibit 46 (pp. 526-527).

Further, Bollinger was required to make contributions to the Bollinger Union Plan pension fund. Joint Appendix, Joint Exhibit 1 (p. 11). After February, 1974, Bollinger did not make the contributions to the plan as required. Stipulation of Facts, ¶ 44. At the time of its bankruptcy filing, Bollinger owed this fund $26,864. Joint Appendix, Joint Exhibit 50 (pp. 578-585).

Plaintiff also claims contributions due the Portersville Union Plan. The plan required that Portersville make contributions to the trust fund. Joint Appendix, Joint Exhibit 3 (p. 52). Portersville did not make such contribution for the plan years 1974, 1975, and 1976. Stipulation of Facts, ¶45. There is a total contribution due, for the years 1974 and 1975, of $16,642.84. Joint Appendix, Joint Exhibit 52 (p. 601). There is no evidence of the amount due for 1976.

The outstanding contributions total $72,167.47.[29] The defendants do not deny that the contributions were not paid and remain outstanding; rather, they raise the following legal argument to prevent liability on their part. The defendants point to several of the trust agreements which provide that the trustees shall not have the right and shall not be subject to

any duty to demand or collect from the company any sums of money. See Joint Appendix, Joint Exhibit 12 (pp. 131-132) and 13 (pp. 157-158). Based on these provisions, the defendants assert that the companies were contractually obligated to make the contributions, but the trustees had no obligation to enforce those contractual obligations. Specifically, the defendants assert that, in light of the provisions which limited their right, and imposed no duty on them, to collect the delinquent contributions, they would have had no standing to bring an action to collect the delinquent amounts. Moreover, the defendants contend that the companies were not in a financial position to make such payments and, therefore, the defendants acted prudently by not attempting to collect the debts. The defendants claim that they fulfilled their fiduciary obligations by billing for these amounts. In essence, the defendants

contend that they cannot be held personally liable for failure to enforce the companies' contractual obligations.

These arguments are not convincing to the Court. The Court acknowledges that certain provisions in the trust agreements did not require the trustees to collect debts from the companies, but the Court does not turn its decision on that basis. Rather, the Court relies upon the forbidden self-dealing rule already discussed in this Opinion. Under that rule, a fiduciary is forbidden to make the business an object of interest to himself. In re Noonan's Estate, supra, at 31, 63 A.2d at 83. As stated, the test for forbidden self-dealing is "whether the fiduciary had a personal interest in the subject transaction of such a substantial nature that it might have affected his judgment in a material connection," and "the extent of a fiduciary's disqualifying

interest for self-dealing is not 'did his interest affect his judgment,' but rather 'might his interest affect his judgment.'" Id.

Here, at the same time that Greene and Allen served as trustees of the Bollinger Union and Salaried Plans, Greene served as Vice-President and Chairman of the Board of Bollinger and Allen served as President and a member of the Board of Directors of Bollinger. Defendants' Answer to First Interrogatories, ¶ 1(e) and (f) (docket entry 33); Allen deposition of October 27, 1981, p. 56. Moreover, at the same time that Greene and Allen served as trustees of the Portersville Union Plan, Greene was Chairman of the Board and Vice-President of Portersville and Allen served as President of Portersville. Defendants'

Answer to First Interrogatories, ¶ 2f (docket entry 33); Allen deposition of October 27, 1981, p. 31.

This means that the trustees were controlling both the trust accounts and the companies which owed contributions to those accounts. Paragraphs 26 and 27 of the Stipulation of Facts reveal that after 1971, Greene retained possession of all checkbooks, passbooks, and other documents of all trust accounts. Thus, Greene and/or Allen were the only ones in position to know that the contributions were not being made. It is apparent to the Court that Greene and Allen had personal interests in these contributions which might have affected their judgment in connection with the failure of the companies to make these contributions. In essence, the trustees permitted their personal needs and desires to affect a decision in connection with the plans. Under these circumstances,

Greene and Allen cannot hide behind the agreement language which provided that they had no right or obligation to collect debts. Their connection with these contributions goes much deeper than the failure to collect delinquent contributions; it (the connection) goes to the failure to make the contributions in the first instance and to the permitting of the delinquencies to go unnoticed for such a long period.

This Opinion has already discussed the fact that certain "wash transactions" occurred in order to make the records show loan transactions, rather than delinquent contributions. Greene and Allen both took part in these transactions for the purpose of "hiding" some of the delinquent contributions on the books.

Again, the argument may be made that Greene was prime motivator in the

failure to pay contributions, and should be exclusively liable, but again the Court rejects this argument. The Court again notes that a co-trustee has a duty to intervene when any fact calls his attention to the mismanagement of the trust funds by a co-trustee. Failure to intervene at that point results in a breach of trust, which imposes liability upon the trustee. Adams Estate, supra, at 81. Allen's own deposition reveals that he was aware of the "wash transactions." Allen deposition of October 27, 1981, p. 55. More importantly, Allen knew that the companies were not meeting their financial obligations and, specifically, that contributions were being withheld from the employees, but not paid to the funds. Allen deposition of October 27, 1981, pp. 57, 72, and 101. In fact Allen was not concerned because "this was...all going to

be caught up at some point in time." Allen deposition of October 27, 1981, p. 101.

It must be remembered that a plaintiff who seeks to surcharge a trustee must prove that the trustee breached an applicable fiduciary duty and that there is a causal connection between the breach of duty and the loss. Estate of Stetson, supra, at 83, 345 A.2d at 690. The Court finds that plaintiff has met its burden here by establishing that defendants breached their fiduciary obligation in connection with the contributions and that there is a causal connection between this breach of duty and the loss. Accordingly, the Court imposes liability upon the defendants for the amount of the outstanding contributions, $72,167.47.

B. Post-ERISA Claims

Plaintiff also asserts claims under ERISA. ERISA took effect on January 1, 1975. 29 U.S.C. §1114. Under 29 U.S.C. §1114(b)(2), it was possible to postpone the effective date of ERISA, in connection with §1102 (Establishment of plan); §1103 (Establishment of trust); §1105 (Liability for breach of co-fiduciary); and §1110 (Exculpatory provisions; insurance), until no later than January 1, 1976. The four plans applied for, and received, postponements until June 30, 1975. Joint Appendix, Joint Exhibit 16 (pp. 183-194). Thus, all provisions of ERISA applied in this case as of June 30, 1975, at the very latest, while the majority of the provisions, such as 29 U.S.C. §1104 (Fiduciary duties), became effective as of January 1, 1975.

There is one issue that needs to be addressed before commencing with a discussion of plaintiff's substantive claims under ERISA. The plaintiff's brief raises the issue of Greene's and Allen's attempt to resign as trustees before the effective date of ERISA. All of the trust agreements required written notice to the Company or Employer for effective resignation of the trustees. Joint Appendix, Joint Exhibit 2 (p. 27); Joint Exhibit 12 (p. 153); and Joint Exhibit 13 (p. 167). The trustees, Greene and Allen, did tender resignation letters, but these letters were addressed to the trustees of the various plans. Joint Appendix, Joint Exhibits 14 and 15 (pp. 173-181). In effect, the trustees notified themselves that they were resigning. These letters did not comply with the resignation requirements. Moreover, the trustees did not notify the institutions which handled the various trust accounts. Greene

deposition of October 26, 1981, pp. 94-95; Allen deposition of October 27, 1981, p. 27. Moreover, no new trustees were appointed (Stipulation of Facts, ¶ 15), and, most importantly, Greene continued to perform the functions of trustee and retained possession of all checkbooks, passbooks, and other documents up until the time that the PBGC became statutory trustees. Stipulation of Facts, ¶ 17 and ¶ 27. Under ERISA, a trustee must be held to have continued in a fiduciary status absent a clear resignation, and a resignation is valid only when he has made adequate provision for continued prudent management of the plan assets. Freund v. Marshall & Ilsley Bank, 485 F.Supp. 629, 635 (W.D. Wis. 1979). Applying this law to the facts of this case, the Court finds that the trustees neither tendered a valid resignation nor made adequate provision for continued prudent management of the plan assets. Accordingly, the Court finds

that Greene and Allen remained as trustees and fiduciaries after the effective date of ERISA.

1. The Loans and Contributions

Plaintiff asserts that the pre-ERISA violations give rise to ERISA liability for failure to take corrective steps after the effective date of ERISA. Specifically, plaintiff asserts that defendants had an obligation to take corrective steps in connection with the pre-ERISA loan transactions, preferably by attempting to collect the same. Further, plaintiff contends that the defendants/ trustees should have attempted to collect delinquent contributions, or, at the very least, take some corrective measures with regard to the delinquent contributions, and to insure the payment of those contributions due after the effective date of ERISA.

The Second Circuit opinion in Morrissey v. Curran, 567 F.2d 546 (1977), addressed a situation in which pre-ERISA breaches of trust continued after the effective date of ERISA.[30] The Second Circuit held that ERISA trustees cannot be excused from a fiduciary obligation merely because an unwise investment was made before ERISA took effect. In concurring in Morrissey, Judge Lumbard stated:

> Just as trustees who retained their posts through the magic date of January 1, 1975, may be said to have started with a clean slate (in the eyes of federal law) with respect to the quality of the plan's investments, so they started with a clean slate with respect to abuses that they may have deliberately ignored or aided in concealing--but in either case, the slate would rapidly be soiled if the trustees did not take advantage of the locus poenitentiae afforded them by the statute, and swifty act to remedy their and their co-trustees' past delicts.

Id. at 550. As a basis for this statement and as an example of steps that could be taken to clear up the pre-ERISA problems, Judge Lumbard cited the following legislative history:

> [T]he most appropriate steps in the circumstances may be to notify the plan sponsor of the breach, or to proceed to an appropriate Federal court for instructions, or bring the matter to the attention of the Secretary of Labor.

Id., quoting House Conference Report No. 93-1280, 93d Cong., 2d Sess., 1974 U.S. Code & Cong. & Ad. News 5080. Accordingly, the Court finds that a pre-ERISA breach of duty can give rise to ERISA liability if proper corrective measures are not taken.

In enacting ERISA, Congress intended to federalize the common law of trusts. Freund, supra, at 635. See 93d

Cong., 2d. Sess., U.S. Code Cong. & Ad. News, pp. 4639, 5186 (remarks of Senator Harrison Williams).[31] In essence, ERISA seeks to establish uniform fiduciary standards. Freund, supra, at 635. ERISA codifies the "prudent man rule" at 29 U.S.C. §1104(a)(1)(B), which requires that a fiduciary discharge his duties:

> with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims.

Moreover, ERISA requires a fiduciary to diversify investments in order to minimize the risk of large losses. 29 U.S.C. §1104(a)(1)(C). These provisions indicate that the defendants were bound by essentially the same requirements after

the effective date of ERISA as they were before said date.

The defendants argue that they acted prudently after the effective date of ERISA, by not attempting to collect the delinquent loans and the delinquent contributions because it was obvious, at that time, that the companies could not pay these debts, and it would have been imprudent to attempt to collect such debts from entities which could not pay them.[32] Moreover, the defendants again assert that they had no obligations, under the trust agreements, to collect delinquent contributions. The Court does not accept this reasoning.

First, the Court addresses the continuing violation in connection with the pre-ERISA loan transactions. This Court has previously held that pre-ERISA acts may result in post-ERISA liability on

the basis of a continuing duty to review and liquidate improvident assets. Trustees of the Retirement Benefit Plan v. Equibank, 487 F.Supp. 58, 62 (W.D. Pa.), appeal dismissed, 639 F.2d 772 (3d Cir. 1980). That is, many pre-ERISA investment decisions can result in ERISA liability if there is a failure to continue to oversee improvident investments. Here, the defendants billed the companies for the loans, but took no action to collect them or to insure their payment. At the very least, the defendants could have taken steps to, in some way, secure the unsecured demand notes, or, in the alternative, to obtain judgment notes. It must be emphasized that the defendants continued to allow the non-diversifications of investments. This conduct amounts to a breach of the ERISA fiduciary requirements, and the Court is

satisfied that there is a causal connection between the breach and the loss.

Second, the Court addresses the failure of the companies to make contributions. As stated, the defendants assert that the trust agreements imposed no obligation to collect such debts. Even conceding this point, the Court finds that defendants violated their ERISA fiduciary duties in connection with these contributions. In Rosen v. Hotel and Restaurant Employees & Bartenders Union, 637 F.2d 592 (3d Cir.), cert. denied, 454 U.S. 898 (1981), an action by an employee against the union, union pension fund, and plan trustees for pension benefits, the Third Circuit addressed the obligation of a trustee, under ERISA, in connection with delinquent contributions. The Court stated that "[a]t a minimum, the fiduciary obligations of a pension fund trustee

require that he notify the pensioner of his employer's failure to contribute to the fund as required by the pension agreement." Id. at 600. The parties have not drawn the Court's attention to any place in the record which indicates that the trustees notified the pensioners of the delinquent contributions; therefore, the Court assumes that no such notification was given.[33] In fact, rather than inform the pensioners of the delinquencies, Greene attempted to relieve the companies of paying part of the contributions. See, e.g., Joint Appendix, Joint Exhibit 51 (pp. 587-588). On this basis the Court finds another breach of fiduciary duty under ERISA, and, again, the Court is satisfied that there is a causal connection between the breach and the loss.

At this point, the Court emphasizes that it adds no new amounts to

the figures already establishing in the preceding section of this Opinion, since those figures represent both pre-ERISA and post-ERISA losses up to the time of the bankruptcy filings of Bollinger and Portersville. However, this discussion of the delinquent loans and contributions serves to point out that the breaches continued after the effective date of ERISA and that it was proper to include in the loss amounts figures from the post-ERISA period. The Court notes, in concluding this section, that both Greene and Allen are liable for these breaches under ERISA for the same reasons set forth in the preceding section on pre-ERISA violations.

2. Lease and Auction

On February 17, 1975,[34] the Bollinger Salaried Trust, the Portersville Salaried Trust, and the Portersville Union

Trust entered into a lease agreement with Economy, a partnership comprised of Greene and Allen. Joint Appendix, Joint Exhibit 32 (pp. 350-352); Stipulation of Facts, ¶ 3 and ¶ 4. The circumstances surrounding that lease follow. In 1975, Superior sold its land and building to Economy. Affidavit of Herbert Zveitel, ¶ 7. Around the same time, Economy and Superior entered into a lease agreement in connection with the same land and building, with Economy as the lessor and Superior as the lessee; in other words, Superior sold its property to Economy and then leased it back. By February of 1976, Superior was in default under the lease, in that it owed $171,325 in rent. Joint Appendix, Joint Exhibit 32 (p. 350).

In February of 1976, Greene and Allen permitted three of the plans to enter into a lease agreement with Economy that also included Superior. The

agreement acknowledged that the plans previously loaned money to Superior ($40,994.76) and that the loan was secured under a security agreement covering Superior's chattels, inventory, and accounts receivable. The essence of this agreement was that the plans took title to all of Superior's physical assets, located on the land and building, for the purpose of selling these assets to satisfy Superior's debts to the plans, and, in addition, that Economy leased the land and building to the plans for the purpose of storing the property until the sale took place. Greene signed on behalf of all of the plans and Greene and Allen signed on behalf of Economy. Joint Appendix, Joint Exhibit 32 (pp. 351-352). Plaintiff seeks a judgment, against Greene, Allen, and Economy for the rent paid ($3,053.98--Joint Appendix, Joint Exhibit 32 (p. 362)) to Economy under this lease.

Plaintiff claims that defendants violated their fiduciary obligation under ERISA by permitting the plan to enter into such a lease arrangement. Plaintiff points specifically to 29 U.S.C. §1106(a), which prohibits a fiduciary from causing a plan to engage in a lease of property between a plan and a party in interest. Plaintiff asserts that since the parties to this agreement are parties in interest (Stipulation of Facts, ¶ 12, the lease agreement was not proper under §1106(a). Accordingly, plaintiff asserts that Greene, Allen, and Economy are liable for the rents paid.

Defendants acknowledge the presence of §1106(a), but cite the Court to 29 U.S.C.§1108(b)(2), which provides an exception to §1106(a). Section 1108(b)(2) provides, in pertinent part, as follows:

> (b) The prohibitions provided in section 1106 of this title shall not apply to any of the following transactions
>
> ***
>
> (2) Contracting or making reasonable arrangements with a party in interest for office space, or legal, accounting or other services necessary for the establishment or operation of the plan,....

The Court could locate only one circuit case that discussed the interplay between §1106(a) and §1108(b)(2). In <u>Marshall v. Snyder</u>, 572 F.2d 894, 901 (2d Cir. 1978), the Second Circuit stated:

> [T]he fiduciary remains a "party in interest" and subject to the substantive requirements of Section 1106;...§1108(b)(2) simply makes[s] it possible to justify transactions which would otherwise be unequivocally prohibited transactions by demonstrating their fairness and reasonableness.

The Court finds that defendants did not so justify the lease transaction in this case. To the contrary, the Court views

this transaction as another attempt to transfer money from the plans to the financially ailing business. In essence, the trustees were attempting to further their own financial interests, and the interests of their partnership, at the expense of the plans. This transaction was unequivocally prohibited, and the fiduciaries violated their obligations under ERISA by permitting the plans to engage in it. Accordingly, all defendants are liable for the $3,053.98 in rent paid.

3. The missing Treasury Notes

At the time of its termination, the Bollinger Union Plan owned United States Treasury Notes, which were held by Dean Witter Reynolds, Inc. (herinafter referred to as "Reynolds"). Joint Appendix, Joint Exhibit 26 (p. 231). In August of 1978, February of 1979, and August of 1979, Reynolds issued checks,

for interest on the Notes, in the amount of $680 each. All three checks were payable to the Bollinger Union Plan. Joint Appendix, Joint Exhibits 57-61 (pp. 612-632). Greene endorsed and cashed the checks of August, 1978 and February, 1979, and the August, 1979, check was deposited in Greene's wife's savings account. The PBGC was statutory trustee at the time that these checks were issued, but the money was never paid to the PBGC. Stipulation of Facts, ¶ 48-50. The defendants make no response to this allegation, and the Court holds that the record is clearly sufficient to hold Greene liable for the total amount of these checks, $2,040.

C. The Counterclaims

As stated in an earlier section, the defendants raise two counterclaims in this action, namely a claim for rent due

under the lease agreement between several of the plans and Economy and a claim for a penalty of $100 per day for every day that the PBGC failed to provide information in connection with the various funds and the pensioners options and eligibility in connection with the same. The Court addresses each counterclaim separately below.

1. The Rental Claim

Defendant Economy claims rental payments due from the Bollinger Salaried Trust, the Portersville Salaried Trust, and the Portersville Union Trust under their lease agreement with Economy. Joint Appendix, Joint Exhibit 32 (pp. 350-352). The Court has already determined that this lease was improper under 29 U.S.C. §1106(a); therefore, defendant Economy's rental claim in connection with that lease is meritless.

2. Failure to Provide Information

Defendants Greene and Allen[35] claim a penalty of $100 from the day that the PBGC failed to provide, upon written request of Greene, a statement of vested and accrued benefits for the Bollinger Salaried Plan participants pursuant to 29 U.S.C. §1025 and §1132(c). Answer to Amended Complaint, p. 6. This claim is meritless in light of the previous decision of this Court in Crawford v. Armour and Company Salaried Employees Pension Plan, C.A. 82-1191 (W.D. Pa. Opinion and Order of November 3, 1982).

In that case, the pension plan moved to dismiss a claim against it for failure to provide information under 29 U.S.C. §1025 and §1132(c). The Court stated that 29 U.S.C. §1132(a)(1)(A) provides that a civil action may be brought by a participant or beneficiary

for the relief provided in §1132(c), which states that an administrator may be liable to any participant or beneficiary, in an amount of up to $100 per day, from the date of a failure or refusal to provide information. Title 29 U.S.C. §§1021-1031 set forth reporting and disclosure requirements under ERISA. These sections impose upon the plan administrator the obligation of reporting on plan descriptions, modifications, and changes, as well as reports to be filed with the Secretary of Labor. Specifically, the administrator is required to publish, for each participant or beneficiary, a description of the plan and a summary of the annual financial report. H.R.No. 93-533, 93d Cong., reprinted in [1974] U.S. Code Cong. & Ad. News, 4639, 4656. This reporting and furnishing of information helps the participant or beneficiary make an informed decision concerning benefits.

After making these determinations in Crawford, the Court turned to the ERISA definition of administrator. Under 29 U.S.C. §1002(16)(A)(i) and (ii), an administrator as "the person specifically...designated by the terms of the instrument..." or "if an administrator is not...designated, the plan sponsor..." Since the instrument in Crawford designated a party other than the pension plan as administrator of the plan, the Court dismissed the claim against the pension plan for failure to provide information because the providing of information is within the exclusive province of the administrator.

The rationale in Crawford is applicable to this case. The Bollinger Salaried Plan instrument did not name a plan administrator. Joint Appendix, Joint Exhibit 2. Section 1002(16)(A)(i) and (ii) provides that when an administrator

is not named in the instrument, the plan sponsor, in this case Bollinger, is the plan administrator for purposes of ERISA. Accordingly, Greene should have directed his request to Bollinger, who had the obligation to provide the information. The PBGC has no obligation and incurs no liability under this counterclaim.

D. Prejudgment Interest

In the final section of this Opinion, the Court addresses plaintiff's claim for prejudgment interest. The key for a discussion of prejudgment interest is Nedd v. United Mine Workers of America, 488 F.Supp. 1208 (M.D. Pa. 1980).[36] The Nedd court addressed the awarding of prejudgment interest under both Pennsylvania and federal law.

As to the claim under Pennsylvania law, the Nedd court cited 20 Pa.C.S.A. §3544, which vests the Court with discretion to hold a personal representative (such as an executor or trustee) liable for prejudgment interest. Nedd, supra, at 1215 n. 4. The Court proceeded to cite several Pennsylvania cases which have held that prejudgment interest is not granted as a matter of right, but may be granted by a court of equity[37] if circumstances dictate.[38] Id. at 1213-1216.

The Nedd court also held that "[a]lthough there is not general controlling congressional directive,[39] federal decisional law has long regarded prejudgment interest as a component of damages.[40] Id. at 1216. After canvassing numerous federal cases, the Court determined that prejudgment interest, under federal law, may be awarded in the

discretion of the Court if circumstances so dictate.[41] *Id.* at 1216-1219.

Having determined that the basis for awarding prejudgment interest is the same under both Pennsylvania and federal law, the Court developed four basic factors that a court may weight in exercising its discretion on the issue of prejudgment interest. The four basic factors derived from the Pennsylvania and federal cases and reviewed by the court in *Nedd* are as follows: (1) whether the claimant has been less than diligent in prosecuting the action; (2) whether the defendant has been unjustly enriched; (3) whether an award would be compensatory; and (4) whether countervailing equitable considerations militate against a surcharge.[42] *Id.* at 1219. The Court deems it appropriate and necessary to apply these factors to the case at hand.

First, the Court does not believe that plaintiff delayed in prosecuting this action. The Court is cognizant that the first breaches of fiduciary duties occurred as early as 1971; however, as stated several times in this Opinion, the breaches remained hidden due to the fact that the trustees also controlled the companies and all passbooks, checkbooks and other documents in connection with the trust funds. Plaintiff did not have an opportunity or cause to review all of the records until it became statutory trustee in 1976. After that time, the Court is aware of the fact that it probably took some time to sort the materials out and uncover the problems. Accordingly, the Court concludes that the nine-year lapse of time between the first breach of duty and the institution of this action cannot be attributed to delay tactics or want of diligence.

Second, the Nedd court emphasized that the "undoing" of unjust enrichment is a basic purpose of prejudgment interest, and the Court stated that unjust enrichment occurs when a "defendant has had the free use of the income-producing ability of plaintiff's money without having to pay for it...." Id. at 1220 (quoting Recent Developments-Prejudgment Interest of Damages: New Application of an Old Theory, 15 Stan. L. Rev. 107, 109 (1962)). The Nedd court suggested that the "use-valve" [SIC] of the money, alone, may be sufficient for the granting of unjust enrichment. Id. In this action, the vast majority of the money was never repaid. Those small sums that were repaid were applied directly to principal, even those [SIC] interest on the principal amount was due and owing. The Court is cognizant of the fact that the companies, and not the trustees, used the funds; however, the defendants/trustees

indirectly benefitted in that they were the main officers of the companies that remained afloat as a result of this money. In the case of Economy, it directly benefitted from the use of the improper rental payments. Therefore, the Court is satisfied that all defendants were unjustly enriched by the "use-valve" of the money.

Next, the Court considers whether an award of prejudgment interest would be compensatory. This consideration is based on the belief that "the inherent income-producing ability of money cannot be separated from the money itself...." Nedd, supra, at 1221 (quoting Recent Developments, supra, at 109). In this case, the Court strongly believes that if the trust funds had had the benefit of these funds during the period between the breach and the judgment, it could have, and, in fact, would have, invested it,

thereby generating income for the fund. Thus, prejudgment interest is necessary to compensate for this lost revenue.

Finally, the Court sees no equitable considerations that militate against prejudgment interest. Rather, all equitable considerations, that the Court can think of, weigh in favor of prejudgment interest.

In awarding prejudgment interest in this action, the Court looks to the Pennsylvania legal rate of interest, which is 6 percent.[43] 41 P.S.§202. In order to avoid confusion, the Court will calculate and detail the interest due on each amount below.

First, the Court addresses the $170,780.36 outstanding loan debt. It must be remembered that all loans called for 9 percent interest, which was added to

the figures already set forth in this Opinion.[44] Therefore, the Court will award prejudgment interest to the amounts set forth from the date that those amounts are calculated to.[45] The Court adds that it will restrict its calculations to a monthly, rather than daily basis.

The Court previously calculated the principal and interest due to the plans, as of February, 1976, on a loan to Superior to be $78,175. Six percent simple interest on that amount from February, 1976, through the date of judgment (7 years, 1 month) is $33,224.38.

All other amounts of the loans were calculated as of March, 1976. As of that time, March, 1976, there remained $92,605.36 outstanding. Six percent simple interest on that amount from March, 1976, through the date of judgment (7 years) amounts to $38,894.25.

Next, the Court addresses the prejudgment interest due on the unpaid contributions.[46] The Court first addresses the contributions due to the Bollinger Salaried Plan. Initially, the Court notes that as of March, 1976, Bollinger owed $14,269.18 in employee contributions. That figure is comprised of $5,117.60 due as of December 18, 1974; $6,522.24 due as of December 18, 1975; and $2,629.34 due as of March 31, 1976. Joint Appendix, Joint Exhibits 46 and 47 (pp. 519, 527). Six percent simple interest on $5,117.60 from December, 1974, through the time of judgment (8 years, 3 months) is $2,533.21. Six percent simple interest due on $6,522.24 from December, 1975, through the time of judgment (7 years, 3 months) is $2,837.17. Six percent simple interest due on $2,629.34 from March, 1976, through the date of judgment (7 years) is $1,104.32. These three interest figures total $6,474.70.

As of March, 1976, Bollinger owed $14,391.45 in employer contributions. That figure is comprised of $5,552.30 due as of December, 1974, and $8,839.15 due as of December, 1975. Joint Appendix, Joint Exhibit 46 (pp. 527-527). Six percent simple interest on $5,552.30 from December, 1974, through the date of judgment (8 years, 3 months) is $2,748.39. Six percent simple interest on $8,839.15 from December, 1975, through the date of judgment (7 years, 3 months) is $3,845.03. These two interest amounts total $6,593.42.

Bollinger also owed contributions to the Bollinger Union Plan. The amount owed, as of March, 1976, was $26,864. This figure is comprised of $9,026.50 due as of October 31, 1974; $10,078.50 due as of October 31, 1975; and $7,759 due as of March, 1976. Joint Appendix, Joint Exhibit 50 (pp. 544-581). Six percent

simple interest on $9,026.50 from October, 1974, through the date of judgment (8 years, 5 months) is $4,558.38. Six percent simple interest on $10,078.50 from October, 1975 through the date of judgment (7 years, 5 months) is $4,484.93. Six percent simple interest on $7,759 from March, 1976, through the time of judgment (7 years) is $3,258.78. These interest figures total $12,302.09.

The final contribution amount outstanding is $16,642.84 owed the Portersville Union Plan by Portersville. This figure is comprise of $5,271.75 due as of September, 1974, and $11,371.09 due as of September, 1975. Joint Appendix, Joint Exhibit 52 (pp. 600-602). Six percent simple interest on $5,271.75 from September, 1974, through the date of judgment (8 years, 6 months) is $2,688.59. Six percent simple interest of $11,371.09 from September, 1975, through

the time of judgment (7 years, 6 months) is $5,116.99. These two interest figures total $7,805.58.

The next figure confronting the Court is the rental payments of $3,053.98 made by three of the plans to Economy. It is not quite clear from the record when these payments were made, but it is apparent that they were paid no later than July, 1976. Joint Appendix, Joint Exhibit 35 (p. 362). Therefore, the Court calculates 6 percent simple interest on $3,053.98 from July, 1976, through the time of judgment (6 years, 8 months) as $1,221.59.

The final figure to consider for purposes of prejudgment interest is the $2,040 in missing treasury notes, which Greene converted to his own use. The first payment of $680 was dated August of 1978. Joint Appendix, Joint Exhibit 56

(p. 612). Six percent simple interest on that amount from August, 1978, through the time of judgment (4 years, 7 months) is $187. The second payment of $680 was dated February, 1979. Joint Appendix, Joint Exhibit 58 (p. 620). Six percent interest on that amount from February, 1979, through the time of judgment (4 years, 1 month) is $166.60. The final payment of $680 was dated August, 1979. Joint Appendix, Joint Exhibit 60 (p. 628). Six percent interest on that figure from August, 1979, through the time of judgment (3 years, 7 months) is $146.20. These figures total $409.80.

These prejudgment interest figures total $107,015.61.

Conclusion

At this point, the Court totals the liability of the various parties. The

Court finds defendants Greene and Allen liable, jointly and severally, for the amount of the outstanding loans--$170,780.36; the amount of the outstanding contributions--$72,167.47; the rental amount paid by the plans to Economy--$3,053.98; and the amount of prejudgment interest on these amounts--$106,516.01, for a total liability of $352,517.82. Moreover, the Court holds defendant Economy liable, jointly and severally with defendants Greene and Allen, for the amount of rental payments, $3,053.98, plus the prejudgment interest on that amount of $1,221.59, for a total liability of $4,275.57. Finally, the Court holds defendant Greene individually liable for the amount of the United States Treasury Note interest payments that were converted, $2,040, plus the prejudgment interest on that amount of $499.80, for a total liability of $2,539.80.

An appropriate Order will be issued.

Date: 3/16/83

Alan N. Bloch/s/
United States District Judge

cc: Counsel of record.

End Notes to Memorandum Opinion

[1]The PBGC was established pursuant to 29 U.S.C. §1302.

[2]Title 29 U.S.C. §1025(a) provides as follows: "Each administrator of an employee pension benefit plan shall furnish to any plan participant or beneficiary who so requests in writing, a statement indicating, on the basis of the latest available information--(1) the total benefits accrued, and (2) the nonforfeitable pension benefits, if any, which have accrued, or the earliest date on which benefits will become nonforfeitable."

[3]Title 29 U.S.C. §1132(c) provides as follows: "Any administrator who fails or refuses to comply with a request for any information which such administrator is required by this subchapter to furnish to a participant or beneficiary (unless such failure or refusal results from matters reasonably beyond the control of the administrator) by mailing the material requested to the last known address of the requesting participant or beneficiary within 30 days after such request may in the court's discretion be personally liable to such participant or beneficiary in the amount of up to $100 a day from the date of such failure or refusal, and the court may in its discretion order such other relief as it deems proper."

[4]At this point, the Court notes that the effective date of ERISA was January 1, 1975. 29 U.S.C. §1114(a).

[5]Many of plaintiff's claims arise from conduct which occurred prior to January 1, 1975, the effective date of ERISA.

[6]The defendants point to the six-year general statute of limitations under 42 Pa.C.S.A. §5527(b).

[7]The defendants cite 29 U.S.C. §1113 which provides for a six-year statute of limitations under ERISA.

[8]The complaint was filed on May 22, 1980; six years prior to the date of complaint filing was May 22, 1974.

[9]As the Court stated, "[m]any pre-ERISA investment decisions can result in post-enactment liability due to a 'continuing duty' to oversee improvident investments." Trustees of the Retirement Plan, supra, at 62.

[10]These will be discussed in the next section of this Opinion.

[11]The plaintiff's amended complaint did raise pendent jurisdiction. Moreover, the Court is also cognizant of the fact that it can hear the claims under 28 U.S.C. §1345 (United States as plaintiff), which plaintiff also raises.

[12]There is a dispute as to whether Greene and Allen effectively resigned as trustees at the effective date of ERISA, which will be discussed in the next section of this Opinion.

[13]An express trust is "a trust created or declared in express terms, and usually in writing, as distinguished from one inferred by the law from the conduct or dealings of the parties. A trust created for specific purposes...." Black's Law Dictionary 1354 (5th ed. rev. 1979).

[14]The Court believes that it was not until this time that plaintiff was in the

position to carefully scrutinize the trust records to ascertain the proper course of action.

[15]It should be noted at this point that Greene and Allen were both trustees of the plans and directors, officers, or shareholders of Kincaid, which wholly-owned Superior. Stipulation of Facts ¶ 3, 4, 5, and 15.

[16]The loan consisted of the following contributions from each plan: (1) $9,925 from the Bollinger Union Plan; (2) $16,800 from the Bollinger Salaried Plan; (3) $10,475 from the Portersville Union Plan; and (4) $2,000 from the Portersville Salaried Plan. Joint Appendix, Joint Exhibit 28 (p. 304).

[17]Greene testified, at a deposition, that the original security agreement was "intended...to cover additional advances." Greene deposition of October 26, 1981, p. 137.

[18]It appears to the Court that there was a certain amount of interest due on this principal amount that was not paid (the entire payment was applied to principal), but the plaintiff does not make a claim for this interest amount.

[19]The $78,175 figure is comprised of the following amounts, which include both principal and interest: (1) $23,583 due the Bollinger Salaried Plan; (2) $51,784.50 due the Portersville Union Plan; and (3) $2,807.50 due the Portersville Salaried Plan. Joint Appendix, Joint Exhibit 28 (p. 302).

[20]It should be noted at this point that there is an indication that Superior was selling its accounts receivables, which

served as collateral in the notes to the plans, to the National Acceptance Corporation on a regular basis from 1972 on. First Affidavit of Herbert S. Zveitel, ¶ 11 (docket No. 47).

[21] Joint Appendix, Joint Exhibit 45 (pp. 466-523) reveals that no payments were made between October, 1971 and April 30, 1974, to either principal or interest. Small payments were made between May and August of 1974, and between September of 1974 and December of 1974, Bollinger made payments of $150 per month. Finally, from December of 1974 until Bollinger's bankruptcy filing in March of 1976, Bollinger made monthly payments of $400. All payments were allocated directly to principal.

[22] Bollinger was actually billed through July of 1976, and at that time owed $36,154.47 (Joint Appendix, Joint Exhibit 42 (p. 523)); however, plaintiff's brief makes claim only through the filing of bankruptcy, in March of 1976, for the amount set forth in the text. Accordingly, the Court uses that amount.

[23] Again the Court notes that Bollinger was actually billed through July of 1976, and at that time owed $17,613.75. Joint Appendix, Joint Exhibit 50 (p. 585). Again, however, plaintiff's brief claims only the amount through March of 1976.

[24] The loan of October of 1973 was for $3,000, while the November, 1973 loan was for $750. Joint Appendix, Joint Exhibit 39 (pp. 393, 399).

[25] Once again, plaintiff's claim is only through March of 1976.

[26]The PBGC normally becomes statutory trustee when a plan does not have sufficient assets to satisfy the benefits guaranteed by Title IV. 29 U.S.C. §§1341-1342. In this case, it brings the action on behalf of the beneficiaries.

[27]The Court notes that none of the plaintiff's claims on past-due contributions include interest.

[28]Plaintiff also claims $6,900.27 for the year ending December 18, 1973; however, the Stipulation of Facts indicates that no amounts were paid <u>after</u> August of 1974. This amount was due <u>in</u> August of 1974, and plaintiff does not cite the Court to any material that indicates that it was not paid; the only cite is to a bill for this amount. Joint Appendix, Joint Exhibit 46 (p. 525). Since there is no proof that this amount was not paid, the Court does not award it.

[29]It should be noted that Stipulation of Facts ¶ 45 indicates that Portersville failed to make contributions for the plan years 1972, 1975, and 1976, but plaintiff makes no claim for these contributions.

[30]The Court is cognizant of the fact that <u>Morrissey</u> dealt primarily with a jurisdictional question; however, the Court finds that many of the principles espoused in <u>Morrissey</u> apply in this case.

[31]Senator Williams stated that the objective of ERISA's fiduciary provision is "to make applicable the law of trusts."

[32]The Court views this as a "Catch 22" argument. On the pre-ERISA breach issues, the defendants argued that it was prudent to invest in the companies because there were indications, at that time, that they

would eventually become profitable. Now, the defendants argue that it would have been imprudent to attempt to collect the debts post-ERISA because the companies were not profitable. The Court cannot accept this logic.

[33]Notification was especially important in this case because the trustees also controlled the companies which failed to make the contributions. In the absence of such notification here, there was virtually no way of the pensioners finding out that information.

[34]The Court notes that by this date, all of the provisions of ERISA were in full force and effect in connection with all of the plans.

[35]It should be noted that Greene and Allen make this claim as participants in the Bollinger Salaried Plan.

[36]The Court acknowledges that Nedd is not an ERISA action, but it does involve a breach of trust, and the Court believes that the discussion of prejudgment interest is applicable here.

[37]A court in an ERISA action sits as a court of equity. See Calamia v. Spivey, 632 F.2d 1235 (5th Cir. 1980); Wardle v. Central States Southeast and Southwest Areas Pension Fund, 627 F.2d 820 (7th Cir. 1980).

[38]The Pennsylvania Superior Court has held that a trustee is chargeable with interest where he makes improper investments. In re Jones' Estate, 163 Pa. 129, 131, 60 A.2d 366, 367 (1948).

[39]It should be noted that there is a federal statute governing postjudgment

interest (28 U.S.C. § 1961), but it is silent as to prejudgment interest, and its silence does not preclude an award of prejudgment interest. Bricklayers' Pension Trust Fund v. Taiariol, 671 F.2d 988, 989 (6th Cir. 1982); In re Air Crash Disaster Near Chicago, Illinois, 489 F.Supp. 1280, 1282 (N.D. Ill. 1979), aff'd., 644 F.2d 633 (7th Cir. 1981).

[40]As a basis for this assertion, the Court cited the 1872 United States Supreme Court case of Young v. Godbe, 82 U.S. (15 Wall.) 562 (1872).

[41]Cases from other circuits also support this position. See, e.g., Gelfgren v. Republic National Life Insurance Co., 680 F.2d 79, 82 (9th Cir. 1982) (case, removed to federal court under ERISA, addressing prejudgment interest issue); Bricklayers' Pension Trust Fund v. Taiariol, 671 F.2d 988, 989 (6th Cir. 1982) (case involving prejudgment interest under Labor Management Relations Act and ERISA).

[42] The first three factors were considered by the Ninth Circuit in Gelfgren v. Republic National Life Insurance Co., 680 F.2d 79, 82 (9th Cir. 1981). Moreover, the factors are in keeping with the consideration of prejudgment interest discussed by the Third Circuit in Thomas v. Duralite Co., Inc., 524 F.2d 577, 589 (3d Cir. 1975) and Eazor Express, Inc. v. International Brotherhood of Teamsters, 520 F.2d 951, 973 (3d Cir. 1975, cert. denied, 424 U.S. 935, rehearing denied, 425 U.S. 908 (1976).

[43]All interest calculations will be simple interest; interest will not be compounded.

[44]The Court does acknowledge that certain loan payments were attributed directly to

principal, without the payment of interest. However, the Court cannot award interest for these amounts because the interest cannot be calculated from the record. See Girard Bank v. John Hancock Mutual Life Insurance Co., 524 F.Supp. 884 (E.D. Pa. 1981), aff'd. without opinion, 688 F.2d 820 (3d Cir. 1982).

[45]For example, the amount of the loans owed by Superior, $78,175, is claimed and calculated through February of 1976 (see p. 10 of this Opinion). Thus, prejudgment interest on that amount will be calculated from February, 1976, forward.

[46]The Court can ascertain, from the record, the dates that these amounts came due. There was no interest previously added to these amounts; therefore, the Court will calculate interest from the due date.

APPENDIX B

Judgment Order dated March 16, 1983

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

THE PENSION BENEFIT GUARANTY CORPORATION, as Trustee of the Bollinger Corporation Salaried Employees Pension Plan and the Bollinger Corporation Union Employees Pension Plan and as Trustee of the Portersville Equipment Company Union Employees Pension Plan and the Portersville Equipment Company Salaried Employees Pension Plan, Plaintiff, vs. MORTON J. GREENE and THOMAS R. ALLEN, JR., as individuals and as former trustees of the Bollinger Corporation Salaried Employees Pension Plan, the Bollinger Corporation Union Employees Pension Plan, the Portersville Equipment Company Union Employees Pension Plan, and the Portersville Equipment Company Salaried Employees Pension Plan, and ECONOMY INDUSTRIAL PROPERTIES, Defendants.	)	Civil Action No. 80-688

JUDGMENT ORDER

AND NOW, this 16th day of March, 1983, upon consideration of Plaintiff's Motion for Summary Judgment filed in the above captioned matter on March 23, 1982, IT IS HEREBY ORDERED that said Motion is GRANTED.

AND, FURTHER, upon consideration of Defendants' Motion for Summary Judgment filed in the above captioned matter on March 22, 1982, IT IS HEREBY ORDERED that said Motion is DENIED.

IT IS FURTHER ORDERED that judgment be, and hereby is, entered as follows:

1. In favor of Plaintiff and against Defendants Morton J. Greene and Thomas R. Allen, Jr., jointly and severally, in the amount of $352,517.82;

2. In favor of Plaintiff and against Defendant Economy Industrial Properties, jointly and severally with Defendants Morton J. Greene and Thomas R. Allen, Jr., in the amount of $4,275.57; and

3. In favor of Plaintiff and against Defendant Morton J. Greene in the amount of $2,539.80.

Alan N. Bloch /s/
United States District Judge

cc: Asst. U.S. Atty. Craig R. McKay
633 U.S. Post Office and Courthouse, Pittsburgh, PA 15219.

Pension Benefit Guaranty Corp., Office of General Counsel
2020 K Street, N.W., Washington, D.C.

Wm. A. Hoffman and B.A. Karlowitz, Esquires
20th Floor, Frick Building, Pittsburgh, PA 15219.

APPENDIX C

Judgment Order of the United States Court of Appeals for the Third Circuit dated January 10, 1984

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 83-5264

THE PENSION BENEFIT GUARANTY CORPORATION, as Trustee of the BOLLINGER CORPORATION SALARIED EMPLOYEES PENSION PLAN AND THE BOLLINGER CORPORATION UNION EMPLOYEES PENSION PLAN and as trustee of the PORTERSVILLE EQUIPMENT COMPANY UNION EMPLOYEES PENSION PLAN and the PORTERSVILLE EQUIPMENT COMPANY SALARIED EMPLOYEES PENSION PLAN

vs.

MORTON J. GREENE AND THOMAS J. ALLEN, JR., as individuals and as former trustees of the BOLLINGER CORPORATION SALARIED EMPLOYEES PENSION PLAN, THE BOLLINGER CORPORATION UNION EMPLOYEES PENSION PLAN, THE PORTERSVILLE EQUIPMENT COMPANY UNION EMPLOYEES PENSION PLAN AND THE PORTERSVILLE EQUIPMENT COMPANY SALARIED EMPLOYEES PENSION PLAN AND ECONOMY INDUSTRIAL PROPERTIES,

Appellants

Appeal from the United States District Court
for the Western District of Pennsylvania
(Pittsburgh)
(D.C. Civil No. 80-00688)
District Judge: Alan N. Bloch

Argued
January 9, 1984
Before: ALDISERT, HIGGINBOTHAM, and SLOVITER
Circuit Judges.
(Filed January 10, 1984)

JUDGMENT ORDER

After consideration of all contentions raised by appellants, it is

ADJUDGED AND ORDERED that the judgment of the district court be and is hereby affirmed.

Costs taxed against appellants.

BY THE COURT,

Aldisert /s/
Circuit Judge

Certified as a true copy and issued in lieu of a formal mandate on March 2, 1984.

ATTEST:

Test:

Sally Mrvos, Clerk

Chief Deputy Clerk, United States Court of Appeals for the Third Circuit.

Dated: ____________

APPENDIX D

Relevant portions of ERISA, 29 U.S.C. 1001 *et seq.*

§1001. Congressional findings and declaration of policy

(a) Benefit plan as affecting interstate commerce and the Federal taxing power. The Congress finds that the growth in size, scope, and numbers of employee benefit plans in recent years has been rapid and substantial; that the operational scope and economic impact of such plans is increasingly interstate; that the continued well-being and security of millions of employees and their dependents are directly affected by these plans; that they are affected with a national public interest; that they have become an important factor affecting the stability of employment and the successful development of industrial relations; that they have become an important factor in commerce because of the interstate character of their activities, and of the activities of their participants, and the employers, employee organizations, and other entities by which they are established or maintained; that a large volume of the activities of such plans is carried on by means of the mails and instrumentalities of interstate commerce; that owing to the lack of employee information and adequate safeguards concerning their operation, it is desirable in the interests of employees and their beneficiaries, and to provide for the general welfare and the free flow of commerce, that disclosure be made and safeguards be provided with respect to the establishment, operation, and administration of such plans; that they substantially affect the revenues of the United States because they are afforded preferential Federal tax treatment; that despite the enormous growth in such plans many employees with long years of employment are losing anticipated

retirement benefits owing to the lack of vesting provisions in such plans; that owing to the inadequacy of current minimum standards, the soundness and stability of plans with respect to adequate funds to pay promised benefits may be endangered; that owing to the termination of plans before requisite funds have been accumulated, employees and their beneficiaries have been deprived of anticipated benefits; and that it is therefore desirable in the interests of employees and their beneficiaries, for the protection of the revenue of the United States and to provide for the free flow of commerce, that minimum standards be provided assuring the equitable character of such plans and their financial soundness.

(b) Protection of interstate commerce and beneficiaries by requiring disclosure and reporting, setting standards of conduct, etc., for fiduciaries. It is hereby declared to be the policy of this Act to protect interstate commerce and the interests of participants in employee benefit plans and their beneficiaries, by requiring the disclosure and reporting to participants and beneficiaries of financial and other information with respect thereto, by establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans, and by providing for appropriate remedies, sanctions, and ready access to the Federal courts.

(c) Protection of interstate commerce, the Federal taxing power, and beneficiaries by vesting of accrued benefits, setting minimum standards of funding, requiring termination insurance. It is hereby further declared to be the policy of this Act to protect interstate commerce, the

Federal taxing power and the interests of participants in private pension plans and their beneficiaries by improving the equitable character and the soundness of such plans by requiring them to vest the accrued benefits of employees with significant periods of service, to meet minimum standards of funding, and by requiring plan termination insurance.
(Sept. 1, 1974, P.L. 93-406, Title I, Subtitle A, § 2, 88 Stat. 832.)

§1105. Liability for breach by co-fiduciary

(a) Circumstances giving to liability. In addition to any liability which he may have under any other provision of this part, a fiduciary with respect to a plan shall be liable for a breach of fiduciary responsibility of another fiduciary with respect to the same plan in the following circumstances:

(1) if he participates knowingly in, or knowingly undertakes to conceal, an act or omission of such other fiduciary, knowing such act or omission is a breach;

(2) if, by his failure to comply with section 404(a)(1) [29 USCS §1104(a)(1)] in the administration of his specific responsibilities which give rise to his status as a fiduciary, he has enabled such other fiduciary to commit a breach; or

(3) if he has knowledge of a breach by such other fiduciary, unless he makes reasonable efforts under the circumstances to remedy the breach.

(b) Assets held by two or more trustees.

(1) Except as otherwise provided in subsection (d) and in section 403(a)(1) and (2) [29 USCS §1103(a)(1) and (2)], if the assets of a plan are held by two or more trustees--

(A) each shall use reasonable care to prevent a co-trustee from committing a breach; and

(B) they shall jointly manage and control the assets of the plan, except that nothing in this subparagraph (B) shall preclude any agreement, authorized by the trust instrument, allocating specific responsibilities, obligations, or duties among

trustees, in which event a trustee to whom certain responsibilities, obligations, or duties have not been allocated shall not be liable by reason of this subparagraph (B) either individually or as a trustee for any loss resulting to the plan arising from the acts or omissions on the part of another trustee to whom such responsibilities, obligations, or duties have been allocated.

(2) Nothing in this subsection shall limit any liability that a fiduciary may have under subsection (a) or any other provision of this part.

(3)(A) In the case of a plan the assets of which are held in more than one trust, a trustee shall not be liable under paragraph (1) except with respect to an act or omission of a trustee of a trust of which he is a trustee.

(B) No trustee shall be liable under this subsection for following instructions referred to in section 403(a)(1) [29 USCS §1103(a)(1)].

(c) Allocation of fiduciary responsibility; designated persons to carry out fiduciary responsibilities. (1) The instrument under which a plan is maintained may expressly provide for procedures (A) for allocating fiduciary responsibilities (other than trustee responsibilities) among named fiduciaries, and (B) for named fiduciaries to designate persons other than named fiduciaries to carry out fiduciary responsibilities (other than trustee responsibilities) under the plan.

(2) If a plan expressly provides for a procedure described in paragraph (1), and pursuant to such procedure any fiduciary responsibility of a named fiduciary is allocated to any person, or a person is designated to carry out any such responsibility, then such named fiduciary shall not be liable for an act or omission of such person in carrying out such responsibility except to the extent that--

(A) the named fiduciary violated section 404(a)(1) [29 USCS §1104(a)(1)]--

(i) with respect to such allocation or designation,

(ii) with respect to the establishment or implementation of the procedure under paragraph (1), or

(iii) in continuing the allocation or designation; or

(B) the named fiduciary would otherwise be liable in accordance with subsection (a).

(3) For purposes of this subsection, the term "trustee responsibility" means any responsibility provided in the plan's trust instrument (if any) to manage or control the assets of the plan, other than a power under the

trust instrument of a named fiduciary to appoint an investment manager in accordance with section 402(c)(3) [29 USCS §1102(c)(3)].

(d) Investment managers. (1) If an investment manager or managers have been appointed under section 402(c)(3) [29 USCS §1102(c)(3)], then, notwithstanding subsections (a)(2) and (3) and subsection (b), no trustee shall be liable for the acts or omissions of such investment manager or managers, or be under an obligation to invest or otherwise manage any asset of the plan which is subject to the management of such investment manager.
(2) Nothing in this subsection shall relieve any trustee of any liability under this part for any act of such trustee.

(Sept. 2, 1974, P.L. 93-406, Title I, Subtitle B, Part 4, §405, 88 Stat. 878.)

§1144. Other laws

(a) Supersedure; effective date. Except as provided in subsection (b) of this section, the provisions of this title and title IV shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 4(a) [29 USCS §1003(a)] and not exempt under section 4(b) [29 USCS §1003(b)]. This section shall take effect on January 1, 1975.

(b) Construction and application. (1) This section shall not apply with respect to any cause of action which arose, or any act or omission which occurred, before January 1, 1975.

(2)(A) Except as provided in subparagraph (B), nothing in this title shall be construed to exempt or relieve any person from any law of any State which regulates insurance, banking, or securities.

(B) Neither an employee benefit plan described in section 4(a) [29 USCS § 1003(a)], which is not exempt under section 4 (b) [29 USCS §1003(b)] (other than a plan established primarily for the purpose of providing death benefits), nor any trust established under such a plan, shall be deemed to be an insurance company or other insurer, bank, trust company, or investment company or to be engaged in the business of insurance or banking for purposes of any law of any State purporting to regulate insurance companies, insurance contracts, banks, trust companies, or investment companies.

(3) Nothing in this section shall be construed to prohibit use by the

Secretary of services or facilities of a State agency as permitted under section 506 of this Act [29 USCS §1136].

(4) Subsection (a) shall not apply to any generally applicable criminal law of a State.

(c) Definitions. For purposes of this section:

(1) The term "State law" includes all laws, decisions, rules, regulations, or other State action having the effect of law, of any State. A law of the United States applicable only to the District of Columbia shall be treated as a State law rather than a law of the United States.

(2) The term "State" includes a State, any political subdivisions thereof, or any agency or instrumentality of either, which purports to regulate, directly or indirectly, the terms and conditions of employee benefit plans covered by this title.

(d) Alteration, amendment, modification, invalidation, impairment, or supersedure of any law of the United States prohibited. Nothing in this title shall be construed to alter, amend, modify, invalidate, impair, or supersede any law of the United States (except as provided in sections 111 [29 USCS §1031] and 507(b) [29 USCS §1137(b)]) or any rule or regulation issued under any such law.

(Sept. 2, 1974, P. L. 93-406, Title I, Subtitle B, Part 5, §514, 88 Stat. 897.)

No. 83-1782

IN THE
Supreme Court of the United States
OCTOBER TERM, 1984

THOMAS R. ALLEN, JR.,
Petitioner,
v.
PENSION BENEFIT GUARANTY CORPORATION,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF FOR RESPONDENT PENSION BENEFIT GUARANTY CORPORATION IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether a claim by the PBGC against trustees for the recovery of pension plan funds lost through (1) self-dealing and breaches of fiduciary duties under Pennsylvania law prior to 1975 and (2) failure to take corrective action after January 1, 1975 is barred by the provision of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1144, which makes ERISA inapplicable to "any act or omission which occurred before January 1, 1975."

2. Whether a trustee may avoid liability for failure to secure tenuous loans of a pension plan by claiming that efforts to secure such loans would have been "meaningless" in light of the insolvency of the debtors.

3. Whether a fiduciary is civilly liable under ERISA even if he did not "willfully" waste the assets of the pension plan.

PARTIES TO THE PROCEEDING

The Pension Benefit Guaranty Corporation ("PBGC") is a United States government agency created by 29 U.S.C. § 1302(a). Thomas R. Allen, Jr., is a resident of Pennsylvania. Co-defendants in the district court were Morton J. Greene, a resident of Pennsylvania, and Economy Industrial Properties, a Pennsylvania partnership in which Messrs. Allen and Greene are general partners.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases Cited

United States Code (1976) Cited

Acts of Congress Cited

IN THE

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BRIEF FOR RESPONDENT PENSION BENEFIT GUARANTY CORPORATION IN OPPOSITION

OPINIONS BELOW

The judgment of the court of appeals (Pet. App. C) is reported at 727 F.2d 1100. The opinion of the district court (Pet. App. A) is reported at 570 F. Supp. 1483.

JURISDICTION

The judgment of the court of appeals was entered on January 10, 1984. A petition for a writ of certiorari was filed on April 9, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant sections of ERISA (29 U.S.C. §§ 1001, 1105, 1144) appear at Pet. App. D-1 through D-9.

STATEMENT

This litigation involves the liability of two fiduciaries of four defined benefit pension plans under Pennsylvania state law and the Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1001-1381 ("ERISA").[1] The stipulated facts—which were reproduced as an exhibit to the opinion of the district court (570 F. Supp. at 1505-1509)—show that petitioner participated with his co-trustee in a course of self-dealing and imprudent conduct involving the misappropriation of nearly all the assets of the pension plans for the benefit of the companies in which the trustees held interests as directors, officers, or shareholders. The trustees' course of conduct involved four components: (1) self-dealing and imprudent loans between 1970 and 1974, before ERISA was enacted; (2) failure to collect or secure the loans both before and after ERISA's enactment; (3) failure to collect from their companies contributions for the plans both before and after ERISA's enactment; and (4) a post-ERISA sale and lease-back transaction with their own partnership, intended, according to the district court, "to transfer money from the plans to the financially ailing businesses" and "to further [the trustees'] own financial interests, and the interests of their partnership, at the expense of the plans." Pet. App. A-65; 570 F. Supp. 1501.

Although petitioner's co-trustee, Morton J. Greene, was characterized by the district court as "the primary violator" because Greene signed the withdrawal and deposit

[1] ERISA was amended in 1980 by the Multiemployer Pension Plan Amendments Act of 1980, 94 Stat. 1208-1311 (1980). The 1980 amendments to ERISA do not apply to this case. Accordingly, citations to ERISA will be to the 1974 statute as codified in the 1976 edition of the United States Code.

slips, petitioner signed a check for a large amount from a plan to one of the companies, and signed all unsecured demand notes for the loans. Pet. App. A-35-A-36; 570 F. Supp. 1494. The district court also found that petitioner "knew that the companies were not meeting their financial obligations and, specifically, that contributions were being withheld from the employees, but not paid to the funds." Pet. App. A-47; 570 F. Supp. 1497. And while Greene signed the post-ERISA lease with the trustees' partnership on behalf of three of the plans, petitioner also signed on behalf of the partnership. Pet. App. A-62; 570 F. Supp. 1500.

Neither trustee made any effort to collect the loans or the contributions, or to obtain demand notes or judgments. Neither made any effort to diversify the plans' investments. Pet. App. A-57; 570 F. Supp. 1499. Nor did the trustees notify the pensioners of the delinquent contributions. The district court also found that both trustees took part in "wash transactions" to conceal the shortages and "to make the records show loan transacitons rather than delinquent contributions." Pet. App. A-46; 570 F. Supp. 1496.

The district court rejected the claim that the trustees had resigned their positions through resignation letters purportedly written on the day before ERISA became law. The court found that no one else took over their duties, that the financial institutions that handled the trust accounts were not informed, and that the trustees actually did nothing more than "notif[y] themselves that they were resigning." Pet. App. A-50; 570 F. Supp. at 1497.

In May 1980, the PBGC, as statutory trustee, commenced a civil action in the United States District Court for the Western District of Pennsylvania against petitioner, Greene and their partnership to recover losses suffered by the four pension plans during the pre-ERISA and ERISA periods. The PBGC's amended complaint in-

voked jurisdiction under ERISA and asserted pendent jurisdiction over claims made under Pennsylvania law. Pet. App. A-87; 570 F. Supp. 1489, n.11.

Following discovery, the district court ruled on cross-motions for summary judgment. The PBGC's motion was granted, and a money judgment for $352,517.82, including pre-judgment interest, was entered. The district court held that petitioner and his co-defendant had breached their fiduciary duties under Pennsylvania law by making imprudent, unsecured and undiversified loans to their own companies, by engaging in self-dealing in making the loans, by failing to collect the employer contributions and to pay to the pension plans the withheld employee contributions, and by promoting their own interests at the expense of the interests of the beneficiaries of their trust.

The court also found that the trustees violated ERISA after it was enacted by failing to take proper corrective measures and by breaching their continuing duties to review and liquidate improvident investments. The court reasoned that petitioners made no attempt to obtain security for the unsecured demand notes, no attempt to secure judgment notes, no attempt to diversify assets, and no attempt to notify the pensioners of the delinquent contributions. Pet. App. A-52-A-60; 570 F. Supp. 1498-1500. The court also held that the post-ERISA lease between the plans and the trustees' partnership violated ERISA's "prohibited transactions" rules against leases between a plan and a party in interest, and awarded approximately $3,500 to the PBGC in rent improperly paid pursuant to the lease. On January 9, 1984, the court of appeals heard argument, and it affirmed the district court's judgment by summary order on the following day.

ARGUMENT

This is an egregious case of improper conduct by two trustees who looted several pension plans to provide funds for their own private businesses, which ultimately went bankrupt. The PBGC's successful claims against the petitioner are based on *both* Pennsylvania state law, which imposed liability for such conduct prior to the enactment of the federal statute, and ERISA. The district court concluded that federal jurisdiction was validly invoked under ERISA for the trustees' improper acts and omissions after January 1, 1975, when ERISA took effect, and that it had pendent jurisdiction to decide issues of liability under Pennsylvania law relating to the pre-1975 period. These conclusions were patently correct, were properly affirmed summarily by the court of appeals, present no issue of general importance, raise no conflict with decisions in any other Circuit, and do not warrant any further consideration.

1. Petitioner does not challenge the district court's reasoned conclusion that it had pendent jurisdiction over pre-ERISA claims made under Pennsylvania law governing fiduciary responsibility. *See* Pet. App. A-9-A-14; 570 F. Supp. 1488-1489. Nor does petitioner appear to challenge the district court's finding that he violated his fiduciary duties under State law, and that he would be liable, on these principles, for pre-ERISA acts.

This is not, in other words, a case in which substantive liability for acts committed before January 1, 1975, depends entirely on a provision of ERISA. Hence petitioner's assertion that the district court found him liable under ERISA only because he failed "to take corrective action after January 1, 1975" (Pet. 15) is simply erroneous. Petitioner was found liable under Pennsylvania law for the pre-ERISA period because he committed acts prior to January 1, 1975, which violated State law.

In considering whether federal jurisdiction existed,[2] the district court also held that a pension-plan trustee has a continuing duty under federal law to take proper measures after January 1, 1975, to reduce injury attributable to his pre-ERISA violations. The failure to do so constitutes a fiduciary violation under ERISA. As the Second Circuit observed in *Morrisey* v. *Curran*, 567 F.2d 546, 548-49 (2d Cir. 1977): "We have no doubt that under the 'prudent man' rule, which is codified in ERISA, the trustees here had a duty within a reasonable time after ERISA took effect to dispose of any part of the trust estate which would be improper to keep." In his concurring opinion in *Morrisey*, Judge Lumbard noted that the continuing breach concept also includes a duty to take "corrective action if there is a reasonable basis for the recovery of wasted assets from the receiver thereof, or of misused funds from the person who profited from the misuse." 567 F.2d at 550. This is a plainly correct proposition governing fiduciary duties under federal law, and petitioner has cited no contrary authority.

2. There is no substance to petitioner's contention that the insolvency of the trustees' companies rendered it "meaningless" to attempt to recover misspent funds after ERISA became law (Pet. 23-27). The district court rejected this curious claim, which would give greater leeway to trustees if they misdirected the funds of a pension plan to a hopelessly insolvent beneficiary rather than to one which has a chance of recovery. Moreover, the fact that the corporations were insolvent did not necessarily mean that there was no step that could reasonably have been taken to attempt to secure the "loans" that had previously been made. Indeed, if the corporations had

---

[2] The court said that it had to decide whether ERISA applied "because of the jurisdictional question which it raises." Pet. App. A-11; 570 F. Supp. at 1488. After concluding that ERISA did apply, the court said that in view of that finding, "the Court can assume pendent jurisdiction over plaintiff's pre-ERISA, state law claims." Pet. App. A-14, 570 F. Supp. at 1489.

been controlled by third parties with whom the trustees dealt at arms' length, they might well have devised protective measures involving the individual assets of the principals who owned the corporations. In the present circumstances, where the corporations were controlled by the trustees themselves, they had no incentive to secure or otherwise protect the loans that the pension plans had made or the contributions that were due.

In any event, this issue turns largely on an appraisal of the facts, including the solvency of the corporate "borrowers." It is plainly not an issue deserving this Court's attention.

3. Petitioner's final contention is that after his purported resignation of December 31, 1974, he thought himself to be powerless and was, therefore, not guilty of any "willful" abuse of fiduciary obligations (Pet. 28-30). Petitioner does not, however, contest the district court's finding that he was aware of, and personally participated in, the conduct of his co-trustee prior to December 31, 1974. The district court ruled that under ERISA, a trustee has a continuing fiduciary status "absent a clear resignation, and a resignation is valid only when he has made adequate provision for continued prudent management of the plan assets." *See* Pet. App. A-51; 570 F. Supp. 1497, citing *Freund* v. *Marshall & Ilsley Bank*, 485 F. Supp. 629, 635 (W.D. Wis. 1979). Petitioner plainly did not meet that standard. Further, 29 U.S.C. § 1105(a)(3) makes a fiduciary liable on the basis of knowledge alone, "unless he makes reasonable efforts under the circumstances to remedy the breach." The record contains no evidence of any effort whatever by the petitioner "to remedy the breach."

Indeed, in February 1976, petitioner participated personally, on behalf of the trustees' partnership, in the lease agreement with the plans which continued the effort to use the plans to bail the trustees' corporations out of their financial problems. This transaction alone refutes

petitioner's claim that "his involvement with the trusts completely stopped" after the end of 1974 (Pet. 30). Even if he did not nominally act then on behalf of the pension plans, his actions amounted to a continuation of the earlier abuse of the trustees' authority.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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August 1, 1984